A MANUAL

OF

ELEMENTARY LAW

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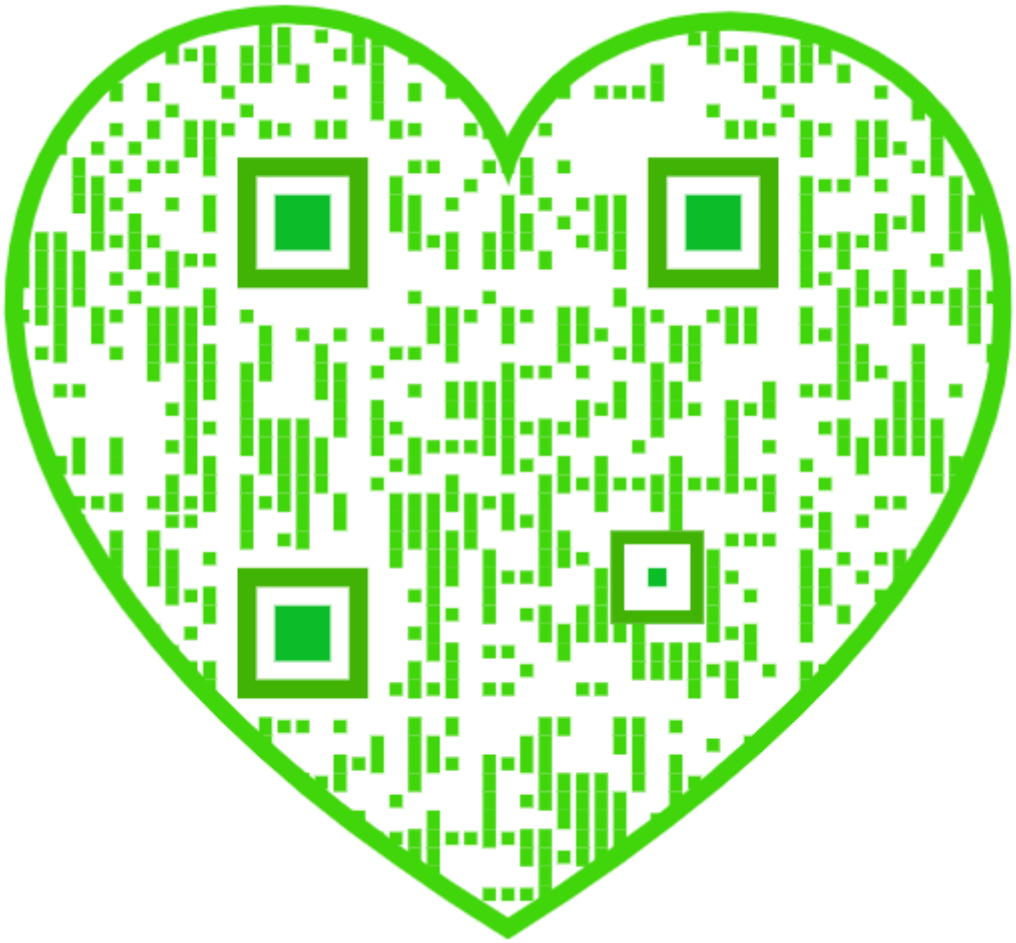
ST. PAUL, MINN.
WEST PUBLISHING CO.
1896



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TO

FLOYD R. MECHEM,

To whose inspiration as a teacher and encouragement as a friend
whatever merit may be found in the following
pages is largely due,

I RESPECTFULLY INSCRIBE THIS WORK.

PREFACE.

The following pages are intended as an introduction to the study of the law. Their aim is simply to take the student across the threshold, and give him a general view of the treasures of learning which lie beyond. The Anglo-American legal system may be compared with one of those old Feudal castles still to be seen in parts of Britain. Essentially an ancient structure, yet having been constantly added to and repaired as the years rolled by, it presents an appearance much different from the Feudal original. Here and there a new wing has been built; and, side by side with the modern elements, standing rugged and strong, some parts of the old building are crumbling into dust.

In the first part of the present work the writer has attempted to present an outside view of this legal edifice. In parts 2 and 3 he has tried to classify its contents, and explain briefly their general character.

It is hoped that the book may be found not wholly unsuited for the purpose it is intended to accomplish.

W. D. S.

Ann Arbor, Mich., May 1, 1896.

TABLE OF CONTENTS.

PART 1.

Elementary Jurisprudence.

CHAPTER I.

NATURE OF LAW AND THE VARIOUS SYSTEMS.

Section.		Page
1–2.	Law in General	1–2
3–5.	Laws of Human Action—Sanction	2–4
6.	Moral Law	4–5
7.	Divine Law	5
8.	Municipal or Positive Law	5–7
9–11.	International Law	7–10
12–13.	Maritime Law	10–13
14.	Martial Law	13

CHAPTER II.

GOVERNMENT AND ITS FUNCTIONS.

15.	The State	14–15
16–19.	Sovereignty	15–17
20.	The Constitution	17
21.	The Government and Its Relation to Its Subjects	18–19
22.	The Functions of Government	19
23.	The Forms of Government	20–23
24.	Confederation of States	23
25.	The Modern Federal State	23
26.	The Branches of Government	24–25

CHAPTER III.

GOVERNMENT IN THE UNITED STATES.

Section.		Page
27.	General Character of the United States Government	26–27
28.	The Colonial Government	27
29.	Revolutionary Government and Articles of Confederation	28
30–31.	The United States Constitution	29–30
32.	Relation of the State and Federal Governments	31–32
33.	Sovereignty in the United States	32–33
34.	Distribution of Powers in the Federal Government	33–35
35.	The State Governments	35–38
36.	Local Self-Government	38–40
37–39.	Citizenship and Naturalization	41–42

CHAPTER IV.

THE UNWRITTEN LAW.

40–41.	In General	43–45
42–45.	The Roman Law—Codification	45–47
46.	The Common Law	47–48
47–48.	Customs—Stare Decisis	48–50
49–51.	Its Development—Fictions—Equity	50–52
52.	The Law Merchant	52
53.	The Canon Law	53
54–56.	Unwritten Law in America	53–55

CHAPTER V.

EQUITY.

57–59.	Equity Courts and Their General Jurisdiction	56–59
60–62.	Specific Character of Equity Jurisdiction	60–61
63–75.	The Maxims of Equity	61–63

CHAPTER VI.

THE WRITTEN LAW.

Section.		Page
76–79.	In General—Statutes	64–66
80.	Relation to the Unwritten Law	66–67
81–83.	Statutes—How Enacted	67–69
84.	Constitutionality	69–70
85–87.	Affirmative and Negative	70
88–90.	Declaratory and Remedial	71
91–93.	Public and Private	71–72
94–96.	General and Local	72
97–99.	Mandatory and Directory	73
100–102.	Prospective and Retrospective	74

CHAPTER VII.

THE AUTHORITIES AND THEIR INTERPRETATION.

103.	The Rank of the Various Authorities	75–76
104–109.	General Rules for the Interpretation of Laws	76–77
110–119.	Rules for the Construction of Statutes	78–79
120–122.	The Interpretation of Cases	79–81

CHAPTER VIII.

PERSONS AND PERSONAL RIGHTS.

123–125.	Legal Rights, Wrongs, and Remedies	82–84
126–128.	Rights in Rem and Rights in Personam	84–86
129–131.	Persons, Natural and Artificial; Status	86–89
132.	The Fundamental Rights in Rem	89
133–134.	The Right of Personal Security	89–91
135.	The Right of Personal Liberty	91
136.	The Right of Private Property	92
137–138.	Constitutional Guaranties of the Fundamental Rights	92–94

CHAPTER IX.

PROPERTY.

Section.		Page
139–140.	Property in General	95–96
141–144.	Historical Phases of Property	96–97
145–147.	The Feudal System	97–100
148–150.	Ownership and Possession	101
151–156.	Limitations on Ownership	101–104
157–159.	Corporeal and Incorporeal Property	105–106
160–163.	Real and Personal Property	106–108
164.	Fixtures	108–109

CHAPTER X.

CLASSIFICATION OF THE LAW.

165–166.	Substantive and Adjective Law	110–111
167–168.	Public and Private Law	111–112
169–172.	Subdivisions of Public Substantive Law	112–113
173–176.	Subdivisions of Private Substantive Law	113–116
177.	Public Adjective Law	117–118
178.	Private Adjective Law	118–119

PART 2.

The Substantive Law.

CHAPTER XI.

CONSTITUTIONAL AND ADMINISTRATIVE LAW.

Section.		Page
179.	Written and Unwritten Constitutions	123–124
180–182.	Illustrations	124–126
183–189.	The Construction of Constitutions	126–128
190–191.	The Essentials of a Written Constitution	129–130
192–193.	Administrative Law	131

CHAPTER XII.

CRIMINAL LAW.

194–195.	Nature of Crime and the Criminal Law	132–134
196.	Criminal Incapacity	134–136
197–200.	Classification of Crimes	136–137
201.	Common-Law Felonies	137–140
202.	Modes of Punishment	140–141

CHAPTER XIII.

THE LAW OF DOMESTIC RELATIONS.

203.	Marriage in General	142–144
204.	Impediments	144–146
205.	The Contract of Marriage	146–147
206–207.	The Marriage Relation and Its Incidents	147–148
208.	The Married Women's Acts	148–149

Section.		Page
209–210.	The Termination of the Relation	149–150
211–213.	Parent and Child—Legitimacy	150
214–215.	The Disability of Infants	150–152
216–217.	The Duties of Parents	152
218.	The Rights of Parents	153
219.	Emancipation	153–154
220.	Guardian and Ward	154–155
221–223.	Rights and Duties of Guardians	155
224.	The Termination of the Relation	155–156
225–226.	Master and Servant	156–157
227.	The Termination of the Relation	157

CHAPTER XIV.

CORPOREAL AND INCORPOREAL HEREDITAMENTS.

228–229.	Corporeal Hereditaments	158–160
230–240.	Incorporeal Hereditaments at Common Law	160–166
241–244.	Incorporeal Hereditaments in the United States	166–169

CHAPTER XV.

ESTATES IN REAL PROPERTY.

245–246.	Estates in General—Tenants	170–171
247.	Classification of Estates	171
248–250.	Estates in Possession and in Expectancy	172
251–256.	Classification of Expectant Estates—Remainders	172–175
257–258.	Estates in Reversion and Executory Interests	175–176
259–261.	Freeholds and Estates Less than Freehold	176–177
262–264.	Freeholds of Inheritance and Not of Inheritance	178–179
265–274.	Classification of Estates for Life	180–183
275–279.	Estates Less than Freehold	183–184
280–285.	Estates in Severalty, in Joint Tenancy, and in Common	185–187
286–292.	Absolute and Conditional Estates	187–189
293–297.	Equitable Estates—Uses and Trusts	190–192

CHAPTER XVI.

TITLES TO REAL PROPERTY.

Section.		Page
298.	Titles in General	193–194
299–300.	Title by Descent and Title by Purchase	194–195
301–304.	Classification of Titles by Purchase	195–196
305.	Title by Escheat	196
306.	Title by Accretion	196
307.	Title by Abandonment	197
308.	Title by Forfeiture	197
309.	Title by Prescription	197
310.	Title by Adverse Possession	198
311.	Title by Marriage	198
312–316.	Title by Alienation—By Execution	198–199
317.	Title by Judicial Decree	199
318.	Title by Eminent Domain	200
319.	Tax Titles	200
320–322.	Title by Devise and Title by Grant	201
323.	Title by Grant	201
324.	Public Grant	201–202
325–327.	Private Grant	203
328–333.	Classification of Deeds—Common-Law Deeds	203–206
334–335.	Deeds in the United States	206

CHAPTER XVII.

PERSONAL PROPERTY.

336–339.	Chattels; Real and Personal	207–208
340–342.	Choses and Their Classification	208–209
343–344.	Corporeal and Incorporeal Personal Property	210
345–346.	The Ownership of Personal Property	210–211
347–351.	Titles to Personal Property and Their General Classification	212–213
352–355.	Title by Original Acquisition—Occupancy, Accession, and Creation	213–214
356–359.	Title by Operation of Law—Forfeiture, Succession, and Marriage	215–216

Section.		Page
360–363.	Title by Legal Process—Prerogative, Execution, and Judicial Decree	216–217
364.	Title by Act of Parties	217
365–368.	Title by Gift	217–218
369–369a.	Title by Testament and by Contract	218

CHAPTER XVIII.

SUCCESSION AFTER DEATH.

370–373.	Succession in General	219–221
374–375.	Testate Succession—Wills	221
376–377.	Intestate Succession—Descent and Distribution	222
378.	Escheat	223
379–380.	Executors and Administrators	223–224

CHAPTER XIX.

CONTRACTS.

381.	Definition of Contract	225–227
382–383.	Agreement	227–229
384.	Requisites of Enforceability	229–231
385.	How Enforced	231
386–389.	Classification of Contracts	231–234
390.	Quasi Contract	234

CHAPTER XX.

SPECIAL CONTRACTS.

391–392.	Contracts of Sale—Their Nature and Requisites	235–236
393–394.	The Statute of Frauds	236–237
395–396.	Executory and Executed	237–238
397–398.	Bailments—Their General Nature	238–239
399–400.	Classification	239–240
401.	Liability of the Bailee	240
402–405.	Exceptional Bailees	241–242

Section.		Page
406.	Innkeepers and Common Carriers	242–243
407–408.	Negotiable Contracts	243–244
409–411.	Bills of Exchange	244–245
412–413.	Promissory Notes	245–246
414.	Words of Negotiability	246
415–416.	Methods of Transfer	246–247
417–418.	Contract of Suretyship	247
419.	The Statute of Frauds	247–248
420.	Discharge of the Surety	248–249
421.	Indemnity	249
422–424.	Contract of Insurance	249–250
425.	Insurable Interest	250–251

CHAPTER XXI.

AGENCY.

426.	The Relation in General	252–254
427–428.	The Parties to the Relation	254
429.	Unlawful Agencies	255
430.	The Creation of the Relation	256–257
431–432.	Ratification	257
433.	Termination of the Relation	258

CHAPTER XXII.

COMMERCIAL ASSOCIATIONS.

434.	Partnerships—Their General Nature	259
435–436.	Rights and Liabilities of Partners	260
437.	How Formed—Partnership by Estoppel	261–262
438.	Mutual Agency	262
439–440.	Limited Partnerships	262–263
441.	Partnership Associations Limited	263
442–443.	Voluntary Associations	264
444.	Joint-Stock Companies	264–265
445–446.	Corporations—Public and Private	265
447.	How Created	266–267

Section.		Page
448.	Board of Directors	267
449.	Rights of Stockholders	267
450.	Liabilities of Stockholders	268
451.	Limitations of Existence	268

CHAPTER XXIII.

TORTS.

452.	The Nature of a Tort	269–271
453.	The Elements of a Tort	271
454.	Proximate and Remote Cause	272
455.	Classification of Torts	272–273
456.	Negligence	273–274
457.	Nuisance	274
458.	Conspiracy	274–275
459.	Assault and Battery	275
460.	Defamation	275–276
461.	Malicious Prosecution	276
462.	False Imprisonment	276
463–464.	Trespass	277
465.	Conversion	277
466.	Deceit	278
467.	Infringement	278
468.	Violation of Easements	278
469.	Seduction	279
470.	Malicious Interference with Contract	279

PART 3.

The Adjective Law.

CHAPTER XXIV.

REMEDIES.

Section.		Page
471.	Scope of the Adjective Law	284
472–473.	Remedies—Extralegal and Legal	284–285
474–475.	Extralegal Remedies—Self-Defense	285–286
476.	Recaption or Reprisal	286–287
477.	Entry	287
478.	Abatement of Nuisances	287
479.	Distress	287–288
480.	Accord and Satisfaction	288
481–482.	Arbitration and Award	288–289
483.	Legal Remedies—Penal and Civil	289
484.	Civil Remedies—Common-Law and Equitable	289–290
485–486.	Ordinary Common-Law Remedies—Restoration	290–291
487–491.	Damages	291–292
492–493.	Extraordinary Common-Law Remedies—Mandamus	292
494.	Quo Warranto	293
495.	Prohibition	293
496.	Habeas Corpus	294
497–498.	Equitable Remedies—Injunction	294–295
499.	Specific Performance	295
500–502.	Re-execution, Correction, and Rescission	296
503.	Control of Trusts	296
504.	Foreclosure of Mortgages	297
505.	Quieting Title	297–298
506.	Partition	298
507.	Receivers	298
508–509.	Accounting	298–299
510.	Ne Exeat	299

Section.		Page
511–512.	Discovery	299–300
513.	Perpetuation of Testimony	300
514.	Enforcement of Awards and Judgments	300
515.	Interpleader	300–301

CHAPTER XXV.

COURTS AND THEIR JURISDICTION.

516.	Courts in General	302–303
517.	Courts of Record, and Not of Record	303
518–519.	Jurisdiction—Original and Appellate	303–304
520.	General and Limited	304
521.	Exclusive and Concurrent	304–305
522.	Courts of England before 1873—Courts of Original Jurisdiction	305–307
523.	Courts of Intermediate Appeal	307
524.	Courts of Final Appeal	307–308
525–527.	Courts of England since 1873	308–309
528.	Courts of the United States—Federal Courts	309–312
529.	State Courts	312

CHAPTER XXVI.

PROCEDURE.

530–531.	Procedure in General	313
532.	The Essentials of Procedure	314–315
533–539.	Common-Law Procedure—Forms of Action	315–317
540.	Common-Law Procedure—Outline	318–320
541.	Equity Procedure—Outline	320–322
542.	Code Procedure—Outline	322–323
543.	Criminal Procedure—Outline	323–325

CHAPTER XXVII.

TRIALS.

544–546.	Early Forms of Trial	326–327
547–548.	Trial Procedure—Outline	327–329
549–550.	Evidence	330

MANUAL OF ELEMENTARY LAW.

CHAPTER I.

NATURE OF LAW AND THE VARIOUS SYSTEMS.

1–2. Law in General.
3–5. Laws of Human Action—Sanction.
6. Moral Law.
7. Divine Law.
8. Municipal or Positive Law.
9–11. International Law.
12–13. Maritime Law.
14. Martial Law.

LAW IN GENERAL.

1. The primary signification of the word "law" is "a rule laid down or established."

2. Laws may be broadly divided into:

(a) The laws of physical science,—that is, the laws which govern physical objects; and

(b) The laws of human action.

All material things, whether animate or inanimate, are said to be under the control of law. A governing impulse manifests itself in the movements and conditions of all natural objects,—of rocks and stones and other inorganic things as well as of the lower animals and man. All the rules to which these diverse things are subject bear a general resemblance to each other, bringing them within the most com-

prehensive meaning of the word "law," which has been stated above.

Those laws, however, which regulate the movements of nature, and which may be called the "laws of physical science," are different in their essential character from those which govern the acts of men. The former command objects which lack any power to shape intelligently their own course of conduct, while the latter have to do with men as beings endowed with reason and the ability to determine for themselves what they will do. In other words, the laws of physical science govern mere movement, which is characteristic of beings in whom will power is absent, while the other systems regulate action, which proceeds from an intelligent resolve.

A law of physical science, being addressed to objects which have no power to disobey, is in reality nothing more than an order in nature by which certain results follow certain causes. It is impressed upon matter in such a way that it must inevitably be observed. Thus, under the law of gravitation, if an apple becomes disengaged from the stem, it must fall to the ground, unless some other substance intervenes. There is no power in the apple to choose between that result and some other, but it must of necessity comply with the exact terms of the universal rule.

LAWS OF HUMAN ACTION—SANCTION.

3. The laws of human action include all systems of laws which are addressed to men as beings possessed of will power and discretion, and obedience to which is enforced by some form of sanction.

4. SANCTION — The term "sanction," in its relation to law, signifies the prospect of some evil which will follow disobedience to that law, or of some benefit to follow its observance.

5. The leading systems of laws of human action are:

(a) The moral law.
(b) The divine law.
(c) The municipal or positive law.
(d) International law.[1]

Men are, of course, equally with inanimate nature, under the control of the laws of physical science. All the involuntary movements of the human organism, as the circulation of the blood, the process of digestion, etc., are subject to them. But, as beings possessed of discretion and will power, men come under the direction of those other systems of laws which differ primarily from the laws of physical science, in that they lay down rules which may or may not be obeyed, according to the will of the persons to whom they are addressed. For convenience, we will call these last-mentioned systems, collectively, the "laws of human action." Obedience to them, not being inevitable, is enforced by what is known as "sanction." The sanction of a law is the means which the author of that law employs to compel obedience to it when such obedience is not inevitable.[2] It may take the form

[1] To these may be added maritime law, which, though sometimes spoken of as a system, is not a system distinct from those mentioned, but is in a sense a part both of the municipal and the international law; and martial law, which is in force only during the time of war, and on or near the field of active military operations, and which is a part of the municipal law.

[2] "A command, as Austin has pointed out, is a signification of desire; 'but a command is distinguished from other significations of desire by this peculiarity: that the party to whom it is directed is liable to evil from the other in case he comply not with the desire.' And, as every law is a command, every law imports this liability to evil also, and it is this liability to evil which we call by the name of 'sanction.'" Markby, Elements of Law, § 192.

of threats of punishment, as it usually does in the criminal systems; it may be an assurance on the part of the maker of the law that he will compel any one who violates it to make compensation to any one injured by such violation; or it may be of a more indefinite character, as in the case of the moral law. Whatever form it may take, it is sanction which gives to every law of human action its force and stability.[3] The various systems of laws of human action differ from each other in their mode of establishment, the nature of their principles, and the sanctions by which they are accompanied.

MORAL LAW.

6. The moral law is that system of rules of human action which has its origin in a general sense, on the part of the members of a civilized community, of what is right and wrong, and which finds its sanction in the general disapprobation when any act in violation of it is committed.

This system of law is of gradual growth. Its principles are founded on the experience of civilized mankind, and, as that experience grows larger and reflection on it more profound, the system develops. It is assisted in its growth by the precepts and reasonings of teachers and writers, as well as by the doctrines of religion. Depending, however, as it does, upon the general sentiment of the members of a community, the moral law fluctuates as public opinion changes; and the morality of one people may differ in many points from that of another of a different race or grade of civilization. The moral law, as such, is enforced by indeterminate and uncertain authority. There are no tribunals in which it may be administered. There is no power to try formally

[3] For a full discussion of sanction, see Aust. Jur. c. 22.

alleged offenders against it, and no definite punishment attached to a violation of its principles. Yet, in spite of the vague character of its sanctions, those sanctions exist; being found in the general approbation which is felt towards those who habitually obey it, and disapproval towards those who do not regulate their lives in conformity with its doctrines.

DIVINE LAW.

7. The divine law is that system of rules of human action which men believe to have been established by the Ruler of the Universe, and communicated to mankind by revelation, and whose sanction lies in the assurance of certain rewards and punishments in the present life or in a life to come.

This is the law of religion and faith. According to most religious beliefs, God, having regard to the frailties and weaknesses of human reason, has seen fit to reveal to men certain laws for their government. These laws have their depository in the sacred books of the various religions. Those contained in the Bible are generally received as the divine law throughout Christendom.

MUNICIPAL OR POSITIVE LAW.

8. Municipal[4] or positive law[5] is that system of rules of human action established by the govern-

[4] The term "municipal" properly means "pertaining to a city or free town (municipium)." Its use here, however, is in the sense of "pertaining to a state or nation." The distinction between the two usages should be kept clear.

[5] Blackstone's well-known definition of a "municipal law" is "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and forbidding what is wrong." 1 Bl. Comm.

mental power in a state.[6] It may be either written or unwritten.

This is the law with which the lawyer has chiefly to deal. It differs from the moral law, in that it is laid down by determinate authority and is enforced by determinate sanctions. It is akin to the divine law in the general manner of its establishment, but is distinguished from it by the fact that it is of human origin and human enforcement, and that its punishments are dealt out exclusively in the present life. It is not to be understood, however, that the municipal law, the moral law, and the divine law have no principles in common. Many rules, like those forbidding murder and theft, while retaining the moral sanctions, are also invariably incorporated into the municipal and divine systems. The municipal law is called "positive law," because it is imposed by an authority having undisputed power to insist upon its observance.

A municipal law is a rule of human action, as distinguished from a mere arbitrary command. It must be general, applying to all actions of a particular class, not to a single act alone. A mere order or proclamation commanding one to do a certain act would not be a law; but if it commands all persons, or a class of persons, to act in a certain way, under certain circumstances, such an order would be a municipal law, if it is of such a nature that the state will enforce it.

A municipal law is also to be distinguished from a con-

44. Holland defines it as "a general rule of external human action, enforced by a sovereign political authority." Holl. Jur. p. 37.

[6] The word "state" is used in this sense to denote any organized political society. See post, p. 14. It should not be confused with "State" referring to one of the United States. In the present work the word, when used in the latter sense, will begin with a capital letter.

tract. Every citizen of a particular state is subject to the laws of that state without assenting to them. So far as the state's authority is not limited, the subjects' actions are under its control. On the other hand, a contract is something which the individual assumes voluntarily. The obligations of a contract, when made, have practically the same force as law, because the state will compel their performance; but they originate in the free promise of an individual, and bind that individual alone.

The rules of municipal law are established by the governmental power in the state. They may be laid down expressly and formally by a legislature, or, though not so laid down, rules may become law by recognition and enforcement on the part of the authority by which the laws are applied. If established by express promulgation, they are called "written laws;" if established by recognition merely, the name "unwritten laws" is applied to them. The unwritten laws are also called "customary laws," because they have their principal source in those customs of a community which are so uniformly observed that their observance at last comes to be regarded as necessary to the welfare of the community, and is enforced by the state.

INTERNATIONAL LAW.

9. Public international law, usually called simply "international law," consists of those rules of conduct which independent nations or states agree, either tacitly or expressly, to regard as binding upon themselves, and which regulate their intercourse with one another.

10. Private international law is the collection of rules which regulate the courts of one nation in enforcing rights which have been acquired under

the laws of a foreign state. These rules are often discussed under the title "Conflict of Laws."

11. The principal sources of international law are:

(a) The writings of jurists;

(b) The customs of nations; and

(c) Treaties.

We have seen that, for the purposes of government, men have organized themselves into states or nations; and each nation administers its own system of municipal law. As the world contains many independent nations, which necessarily have considerable intercourse with one another, it is natural that a necessity should be felt for rules by which such intercourse is to be regulated. This want is supplied by the system of rules known as the "international law." These rules apply either to the dealings of sovereign nations with each other, or to cases where the courts of one nation deal with rights acquired under a foreign law, in which case that foreign law is sometimes applied, rather than that of the nation to which the court belongs. The former class of rules forms what is called the "public international law"; the latter, the "private international law." [7]

Public International Law.

There are two important distinctions between the public international law and the municipal law, which should be

[7] Much confusion has arisen from a neglect to distinguish between international law (jus inter gentes) and the law of nations (jus gentium). The former is properly the system which regulates the intercourse of nations with each other; the latter is made up of those rules which are of such natural justice that every nation has made them a part of its municipal law. An example of the rules of the latter system is the law forbidding murder. Any law which all nations enforce is a part of the law of nations; but it has no more connection with the international law than has any other rule of municipal law.

noticed: First. The former is not established by any power having recognized authority to lay down its rules; in other words, there is no authoritative international legislature. Second. Its sanctions are not definite and regularly fulfilled. There are no international courts for its interpretation. Each nation construes it in its own way, and, if any nation refuses to obey its rules, war is the only way by which obedience to it can be enforced. The public international law is classed as a law of human action, on the theory that national action is nothing more than human action in groups.

Sources of International Law.

As stated above, the principal sources of international law are (1) the writings of jurists, (2) the customs of nations, and (3) treaties. The writings of the jurists form a system having about the same force upon nations as the laws of morality have upon individuals. They lay down what the international law ought to be. And yet those principles and rules on which these writers agree are regarded as of great authority. No nation would presume to act contrary to the established rules of the international moral code. As soon, however, as a rule becomes embodied in the customs of the nations, it is recognized as having more than a mere moral force. As the international law properly consists of those rules which nations agree to regard as obligatory upon themselves, it becomes an important question, how is their assent to those rules to be indicated? The fact that they habitually observe them in their intercourse with other nations would be the best evidence of an intention to adopt them as law. Thus, it follows that international usage is of the most binding authority.

Treaties are compacts between two or more nations which, when once adopted, have, as to those nations which enter into them, the force of international law. It is plain, how-

ever, that treaties are ordinarily binding only upon the parties to them. They stand in much the same relation to international law proper that contracts do to the municipal law.

Private International Law.

Every sovereign nation, as has been explained, has the exclusive power to make laws to govern its own dominions; and municipal law can have no intrinsic force except within the territorial limits of the nation which establishes it. But, as a matter of national comity, one nation often enforces the laws of another in certain cases. For example, a marriage entered into in accordance with the laws of the place where the ceremony is performed is recognized as valid, so far as the form of the ceremony is concerned, even in nations whose local marriage laws would have made it invalid had it been solemnized within their territorial limits. Whatever extraterritorial force a nation's laws may thus have, however, is purely a matter of courtesy extended by another state. Still, this courtesy has in some cases become so habitual as to make its observance a matter of international right.[8]

MARITIME LAW.

12. Maritime law is that system of law which particularly relates to commerce and navigation, to business transacted at sea or relating to navigation, to ships and shipping, to seamen, to the transportation of persons and property by sea, and to marine affairs generally.

13. As between nations, each nation has control—

(a) Over a narrow strip of sea along its

[8] For a further discussion of the nature of the various laws of human action, see Holl. Jur. c. 3.

coast, the width of such strip being usually estimated at one marine league from the shore.

(b) Over its citizens when outside its territorial limits; but when they are within the jurisdictional limits of some other nation, its authority over them is concurrent with that of the local government.

(c) Over all ships belonging to it while they are upon the open sea.

(d) Over its ships of war and other public vessels at all times, even though in the harbors of other nations.

The territory of nations is in the main limited to land, and, while each nation has exclusive control over its own inland waters, it is a principle of the international law that the sea in general cannot, except to a very limited extent, be appropriated by one nation to the exclusion of others. A large portion of the earth's surface is therefore outside of the limits of ordinary national jurisdiction, although it is of such a nature that various kinds of crimes and other wrongs may be committed on it as well as on the land. Some form of control over actions performed on the sea being necessary, the international law has apportioned jurisdiction over it between the various nations upon the following plan: (1) Each nation has exclusive control over a narrow strip of the sea along its coast, the width of such strip being usually fixed at one marine league from the shore. The reason of this is that each nation is regarded as able to assume jurisdiction over the sea bordering on its coast so far as the guns of that nation, placed upon the shore, can carry. By reason, therefore, of the recent im-

provements in firearms, which have largely increased their carrying power, the exact limits of this strip of water may be regarded as uncertain, although the courts of the United States still adhere to the marine-league limit. The waters included in this strip are called the "territorial waters" of the nation which controls them. (2) Each nation has control over its citizens when outside of its territorial limits; but when they are within the limits of the jurisdiction of some other state they are also subject to the authority of the local government. (3) Each nation has control over all ships belonging to it while they are on the open sea. And (4) each nation retains full jurisdiction over its ships of war and other public vessels, even when they are in the territorial waters of other nations.[9]

Every nation, therefore, assumes a certain responsibility for the application of its laws to cases arising upon ships accredited to it; but there is a class of ships known as "pirate ships," which do not belong to, and are not recognized by, any nation, and which scour the seas for plunder, without authority from any state. These ships are regard-

[9] When a ship of war or other public ship of one nation is in the harbor of another nation, with which it is at peace, it is under the exclusive control of the country to which it belongs. Maine, Int. Law, pp. 86–92. As to ordinary merchant vessels and other private ships, the weight of international authority is to the effect that they come under the jurisdiction of the local government the moment they enter its territorial waters, although the home government retains a qualified concurrent jurisdiction over them. This is the rule in America and England. Wheat. Int. Law, p. 198; Hall, Int. Law, § 58. "By the law of France, crimes committed on board of foreign vessels in French ports, where none but the crew are concerned, are not considered as pertaining to the jurisdiction of the courts of France; while offenses committed on the shore, and against others than the vessels' crews, come before the tribunals of the kingdom." Wools. Int. Law, § 64.

ed as outlaws, and may be attacked and punished by any nation. Within the limits of its jurisdiction, each nation applies its own system of maritime law, this system being simply a branch of its municipal law. Matters of a maritime character are adjudicated in courts called "courts of admiralty."

MARTIAL LAW.

14. Martial[10] law is that rule of human action which, in time of war and on or near the field of active military operations, is established and enforced by the officer in charge of those operations.

The normal condition of the nations of the world is that of peace, but international differences frequently result in war. In time of war, and within the scope of active military operations, the municipal law is superseded by what is known as "martial law." The suspension of the municipal law, and the establishment of this martial rule, are based upon paramount necessity, and are only justified so far as they are absolutely necessary to the proper conduct of the war. The operation of the martial law is confined to the camp or battle ground and its immediate vicinity. Its rules are largely discretionary with the officer in charge, but he must use his discretion in accordance with the military law and the usages of war; and, if he exceeds or abuses the authority vested in him, he is liable for such abuse or excess to any person injured thereby.

[10] Martial law should not be confused with military law. The latter is the system of rules and regulations which govern a nation's military forces; the former controls all persons within its territorial jurisdiction, civilians as well as soldiers.

CHAPTER II.

GOVERNMENT AND ITS FUNCTIONS.

15. The State.
16–19. Sovereignty.
20. The Constitution.
21. The Government and its Relation to Its Subjects.
22. The Functions of Government.
23. The Forms of Government.
24. Confederation of States.
25. The Modern Federal State.
26. The Branches of Government.

THE STATE.

15. A state is a body of persons, living within a specified territory, permanently organized for the purposes of government.

Of the various kinds of law which have been mentioned, the municipal or positive law is the one with which we are chiefly concerned. We have already shown that the distinguishing feature of this system is that it is "established by the governmental power in a state." The nature and scope of that law, therefore, can best be understood by an inquiry into the nature and functions of the organization to which the term "state" is applied.

Aristotle spoke truly when he said that man is a political animal. He is a creature of many wants, to supply which constant dealings with his fellow men are necessary. It was early found that in these dealings men would not always respect the rights of their fellows through the influence of moral and religious sanctions alone. We may

suppose that the fear that others would encroach upon their rights gave rise to a desire for definite laws, the sanctions of which would be certain and prompt in their fulfillment. The organization of political society, or the state, made such rules possible. Without the state as its maker and enforcer, the positive law could not exist. Because this law is necessary to human welfare, the state is also necessary, and history does not reach back far enough into the past to reveal a civilized people without some form of political organization.

SOVEREIGNTY.

16. Sovereignty is the absolute, unlimited power of governing, without control by or responsibility to any political superior.

17. A state is said to be sovereign or independent when it has this sovereignty within itself, and dependent when the ultimate governing power exists in some other state or ruler to whom it owes allegiance.

18. Only sovereign states are recognized in international affairs.

19. When those possessing the sovereign power in a state delegate the ordinary functions of government to public officers, such officers thus having power to govern within certain limits, that state is said to have a representative government.

The chief purpose of the state is to provide for the establishment and enforcement of the municipal or positive law, or, in other words, to provide for civil government within its territorial limits. In order that this purpose may be accomplished, there is, in legal contemplation, vested some-

where in every independent state the absolute power of exercising governmental control or providing for its exercise. This power is called "sovereignty." At some periods of history, sovereignty was regarded as vested in a single ruler by divine right. At other times, it was believed to be lodged in certain classes of persons who were presumed to be best able to govern well. In the principal modern states, however, the sovereign power is, in practice at least, recognized to be in the people as a whole.[1]

A state is said to be sovereign or independent when it has this sovereignty within itself, and dependent when the ultimate governing power exists in some other state or ruler to whom it owes allegiance. Thus, before the Revolution, the sovereignty of the American colonies was not vested in themselves, but was in the English nation. The Declaration of Independence was an assertion that it was wrongfully so vested. After the Revolution, it became inherent in the new American States, and was so recognized. As stated above, only sovereign states are recognized in international affairs. In an independent state, the sovereign power need not be vested in those who actually make and enforce the laws. Assuming sovereignty to be vested in a certain person or persons, there is nothing to prevent their delegating some or all of their governmental powers to agents or officers. This was done only to a very limited extent in those states where sovereignty was re-

[1] This doctrine, it need hardly be said, is at the foundation of all American institutions. "We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." Declaration of Independence, July 4, 1776.

garded as vested in a single ruler or a limited number of persons; but under the modern theory of popular sovereignty, if the number of persons belonging to a certain state is of sufficient magnitude to render it inconvenient for all to participate directly in the government, which is usually the case, the delegation of power is invariably resorted to. When those possessing the sovereign power in a state delegate the ordinary functions of government to public officers, such officers thus having power to govern within certain limits, that state is said to have representative government.

THE CONSTITUTION.

20. A "constitution" may be defined as the collection of principles and rules, established by the sovereign body, in accordance with which the government of the state is to be conducted.

Those possessing the sovereign power are able to impose upon their governmental officers such restrictions as they may see fit. In most states there is a collection of principles and rules, either expressly established by the sovereign body, or which have grown up through custom, by which the action of these officers is controlled, and their relation to the sovereign body defined. This collection of rules and principles is called the "constitution" of the state, and it is said to be the fundamental law of the land. The constitution of a state can legally be changed, therefore, only by those who possess the sovereign power. By them it may be altered in any way, or even abolished.

THE GOVERNMENT AND ITS RELATION TO ITS SUBJECTS.

21. A subject is one who is bound to submit to the control of the government in a state. He may be either:

(a) A citizen,—that is, one who is a permanent member of the state, and who owes it perpetual allegiance; or

(b) An alien,—that is, one who, owing perpetual allegiance to some other state, is yet bound to obey the laws of the state in question while within its territorial limits. All persons who are not citizens of a particular state are, as to that state, aliens.

Set off against those by whom the various powers of governing are exercised, and whom we will call, for want of a better term, the "government," are the remaining members of the community, who, in their relation to the government, are called "subjects." It is the function and power of the government to establish municipal laws, within the limits prescribed by the constitution, and to compel all subjects to obey them. A subject, therefore, is one who is bound to submit to the control of the government in a state.

We find these three elements, (a) a sovereign person or body, (b) governmental officials, and (c) subjects, in every important state. In many states a particular person may be a member of more than one class. Indeed, in a state with popular representative government, a person may be a governmental officer, a member of the sovereign body, and a subject at the same time. Such a condition can

easily be seen to exist in the United States, in the case of any government official. Subjects may be either citizens or aliens. A citizen of a state is one who is a permanent member of that state, to which he owes perpetual allegiance. An alien is one who, owing perpetual allegiance to some other state, is yet bound to obey the laws of the state in question while within its territorial limits. All persons who are not citizens of a particular state are, as to that state, aliens.

THE FUNCTIONS OF GOVERNMENT.

22. The primary object of government is the protection of the rights of life, liberty, and property; but it also usually undertakes to provide for the positive welfare of its subjects.

The primary object of government is recognized to be the protection of the rights of life, liberty, and property. The rules governing these absolute rights of persons form the nucleus of all systems of law. But in civilized states the government usually undertakes also, to a certain extent, to provide for the positive welfare of its subjects. Every modern government, for example, assumes the conduct of a postal system, the coining of money, the regulation of weights and measures, and many other functions which are not connected with the mere administration of justice. These various functions render government a much more complicated process than it would be were it restricted to the protection of personal and property rights.[2]

[2] Woodrow Wilson, in his work on "The State," gives the following list of the usual functions of government, using the term "constituent" to indicate those functions which are necessary to the proper

THE FORMS OF GOVERNMENT.

23. The various forms of government are:

(a) Patriarchy, or government of the family.

(b) Monarchy. This form of government exists when all governmental powers are vested in a single person.

It may be either:

(1) Absolute,—that is, where the ruler is completely sovereign and irresponsible; or

(2) Limited or constitutional,—that is, where he governs under limita-

administration of justice, and "ministrant" to denote all other ordinary functions:

(a) Constituent functions: (1) The keeping of order, and providing for the protection of persons and property from violence and robbery; (2) the fixing of the legal relations between man and wife, and between parents and children; (3) the regulation of the holding, transmission, and interchange of property, and the determination of its liabilities for debt and for crime; (4) the determination of contract rights between individuals; (5) the definition and punishment of crime; (6) the administration of justice in civil causes; (7) the determination of the political duties, privileges, and relations of citizens; (8) dealings of the state with foreign powers, the preservation of the state from external danger or encroachment, and the advancement of its international interests.

(b) Ministrant functions: (1) The regulation of trade and industry; (2) the regulation of labor; (3) the maintenance of thoroughfares; (4) the maintenance of postal and telegraph systems; (5) the manufacture and distribution of gas, the maintenance of waterworks, etc.; (6) sanitation, including the regulation of trades for sanitary purposes; (7) education; (8) care of the poor and incapable; (9) care and cultivation of forests and like matters, such as the stocking of rivers with fish; (10) sumptuary laws, such as "prohibition laws."

tions prescribed by a sovereign power superior to himself.

It may also be either:

(1) Hereditary; or

(2) Elective.

(c) Aristocracy; that is, where all the governmental powers are vested in a limited number of persons.

(d) Democracy; that is, where the governmental power is vested in and exercised by the people as a whole.

Patriarchy.

The forms of government in different states vary as the character, traditions, and environment of the people who compose them are different. The earliest form of which we have any knowledge is the patriarchy. This was the government of the family. But the patriarchal family was not confined to the man and wife with their own minor children simply. When these children grew up and married, they still remained under the control of the first father as long as he lived, and so did his still more distant descendants. The governing authority was exercised, therefore, by the oldest living male from whom all the other members of the family were descended. When he died, his descendants would divide into as many families as he had sons. A modern example of a form of government similar in some respects to the ancient patriarchy is found in the tribal rule of the North American Indians. It is not in vogue in modern civilized states.

Monarchy.

Monarchy is the government which exists when all governmental powers are vested in a single person. This is

a very ancient form of government. It has existed in some form at every stage of the world's history. It may take the form of an absolute monarchy, in which the ruler is completely sovereign and irresponsible; or it may be a limited or constitutional monarchy, in which the monarch governs under limitations prescribed by a sovereign power superior to himself. It is almost unnecessary to say that purely absolute monarchies are very scarce in modern times. On the other hand, constitutional monarchy is one of the most important forms of modern government. Again, a monarchy may be hereditary, in which the ruler acquires his right to power by virtue of his descent from a previous ruler; or elective, when he is chosen to fill the office of monarch by vote of the sovereign body.

Aristocracy.

Aristocracy is the government which exists when all governmental powers are vested in a limited number of persons. "Aristocracy" literally means the government of the best. The form does not exist in its simplicity in any important modern state, but it enters as an element into many European governments. In ancient times, many pure aristocracies existed.

Democracy.

Democracy is the form of government which exists when the governmental power in the state is vested in and exercised by the people as a whole. Pure democracy, it is plain, can only exist in very small communities, for it involves the coming together of the whole people to make the laws. The inconvenience of thus assembling is, in large states, obviated by the delegation of the actual governmental duties to public officers. When this is done, the government is called a "representative democracy" or "republic." By

the use of the representative principle, the territory which may be united into a single democratic state is practically unlimited.

CONFEDERATION OF STATES.

24. A confederation of states, or a confederacy, is the name applied to a number of states which have, by treaty, agreed to act in common concerning certain specified matters.

A confederacy is a mere league of states. Each state retains its full sovereignty, and therefore no sovereign power is vested in the confederacy itself.

THE MODERN FEDERAL STATE.

25. A federal state, on the other hand, exists where several states have surrendered to a permanent central government full power in certain matters of a common interest, retaining in themselves only a power limited to such affairs as are not within the jurisdiction of the central government.

The federal state is a permanent political organization, while a confederation, depending upon treaty, may be discontinued by the withdrawal of the states which form it. Such a withdrawal is called "secession." In the American Civil War the principal issue was whether the United States constituted a federal state or a mere confederacy. If the latter, any State might rightfully withdraw from the Union at any time when, in its opinion, the terms of the treaty of confederation were broken. If, however, the Union was a federal state, it was as permanent as the individual States themselves.

THE BRANCHES OF GOVERNMENT.

26. The branches or departments of government are:

(a) The legislative department, the duty and power of which is to establish laws.

(b) The judicial department, the duty and power of which is to interpret and apply the laws.

(c) The executive department, the duty of which is to execute the laws.

The government performs its functions through the establishment and execution of laws. It has been thought necessary for the attainment of the highest excellence in the performance of these functions that the duties of making, applying, and executing the laws should be distributed between different bodies of officers; hence most of the leading states have three different branches of government, called the "legislative," "judicial," and "executive" branches, respectively.

The legislative branch or department of government is the department whose duty and power it is to establish laws.

The judicial department is that department whose power and duty it is to interpret the law, and apply it to particular cases. We have seen that a law is in the nature of a rule. It is the judicial duty to show the application of this rule to a particular state of facts.

The executive department is the department which has for its function the execution of the laws. The execution of the laws may consist merely of carrying out the instructions of the judicial power in the fulfillment of the sanc-

tions of the law, or it may be a direct compliance with the instructions of the legislative branch of government. Executive officers are now the servants of one, now of the other, department. Let us suppose, to illustrate the latter class of executive function, that the legislature pass a law providing for the stocking of a certain river with fish. It is hardly probable that such a law would ever come before the judiciary for interpretation and application. It is executed, therefore, by some executive officer—a fish commissioner, perhaps—actually putting the fish into the river.

CHAPTER III.

GOVERNMENT IN THE UNITED STATES.

27. General Character of the United States Government.
28. The Colonial Government.
29. Revolutionary Government and Articles of Confederation.
30–31. The United States Constitution.
32. Relation of the State and Federal Governments.
33. Sovereignty in the United States.
34. Distribution of Powers in the Federal Government.
35. The State Governments.
36. Local Self-Government.
37–39. Citizenship and Naturalization.

GENERAL CHARACTER OF THE UNITED STATES GOVERNMENT.

27. The United States is a notable example of a pure federal state. It is composed of organized communities, technically called "States," so united under a general national government that, while each individual State retains control over its own local affairs, and is supreme as to those affairs, yet the general government is permanent and supreme as to certain matters delegated to it.

In other words, the United States constitution is not a mere compact or treaty of confederation between the States, but an instrument creating a government on such a plan that the nation and the States are both supreme, the former in matters of a national character, the latter in all other matters; and the question what matters are to be regarded as of a national character is answered in the constitution

itself. The form of both the national and State governments is that of representative democracy or republic.

THE COLONIAL GOVERNMENT.

28. Previous to 1776, the inhabited portion of the territory now occupied by the United States was divided between thirteen colonies, all of which were under the governmental control of England.

The colonies were allowed certain rights of self-government, most of them having a local legislative body, whose laws might, however, be defeated by the royal governor of the colony by a mere refusal of his assent to them. The English parliament reserved and exercised the right to legislate for the colonies whenever it saw fit to do so. Each colony was distinct in its government from every other, but they had at various times sent delegates to general conventions or congresses which were called for the purpose of discussing provisions for their common defense against the Indians and other matters pertaining to the general welfare. It was not till 1774, however, that a regular series of these assemblies began, under the name of "Continental Congresses;" and it was one of these congresses which, in 1776, as representatives of the people of the colonies, issued the Declaration of Independence. In this instrument the colonies formally renounced all allegiance to the British crown.[1]

[1] The enacting clause of the declaration was as follows: "We, therefore, the representatives of the United States of America, in general congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name and by the authority of the good people of these colonies, solemnly publish and declare that these united colonies are, and of right ought to be, free and independent states; that they are absolved from all

REVOLUTIONARY GOVERNMENT AND THE ARTICLES OF CONFEDERATION.

29. The Articles of Confederation consisted of a mere compact between the States, in which it was plainly stated that "each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not, by this confederation, expressly delegated to the United States in congress assembled."

During the early part of the war which followed the Declaration of Independence, such government as the new States had was exercised by the continental congress. This form of rule was revolutionary, and somewhat unstable in its character. The need was soon felt for a stronger form of government. The first effort to meet this need was the adoption of the Articles of Confederation. Under these articles, the confederation was a loose league between the States. It was soon found that the general government did not have sufficient power to adequately perform its functions;[2] and this led to the adoption of the constitution.

allegiance to the British crown; and that all political connection between them and the state of Great Britain is, and ought to be, totally dissolved; and that, as free and independent States, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do. And for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor."

[2] Judge Cooley sums up the defects of the Articles of Confederation in a singularly concise manner: "The confederation was given authority to make laws on some subjects. but it had no power to compel obedience. It might enter into treaties and alliances which

THE UNITED STATES CONSTITUTION.

30. The constitution of the United States went into effect March 4, 1789.

31. It is purely a written constitution, and is not limited by any unwritten rules except those relating to its interpretation.

A recognition of the deficiency of the Articles of Confederation led to the summoning of a convention of delegates from the several States to meet in Philadelphia in May, 1787, for the purpose of revising the articles. Instead of a mere revision of them, however, it was thought best by the delegates to formulate a new plan of government. Accordingly, they prepared the instrument which was then called and is still referred to as the "Constitution of the United States of America." This constitution was adopted by the States and went into effect March 4, 1789. The

the States and the people could disregard with impunity. It might apportion pecuniary and military obligations among the States in strict accordance with the provisions of the articles; but the recognition of the obligations must depend upon the voluntary action of thirteen States, all more or less jealous of each other, and all likely to recognize the pressure of home debts and home burdens sooner than the obligations of the broader patriotism involved in fidelity to the Union. It might contract debts, but it could not provide the means for satisfying them. In short, it had no power to levy taxes, or to regulate trade and commerce, or to compel uniformity in the regulations of the States. The judgments rendered in pursuance of its limited judicial authority were not respected by the States. It had no courts to take notice of infractions of its authority, and it had no executive. * * * It became at last difficult to enlist sufficient interest in its proceedings to keep up the forms of government through the meetings of congress and of the executive committee." Cooley, Const. Law, p. 15.

constitution, as above stated, is therefore a purely written constitution. It is not limited by any unwritten rules except those relating to its interpretation. Many countries have what is called "unwritten constitutions." By this is meant that their governments are regulated by rules which are not embodied in any one formal document. These rules are traditional or customary, and, although sometimes reduced to writing, in the historical papers and records of the nation, yet such records are usually fragmentary, and valuable only as evidence of what the rules are, rather than as having any intrinsic authority. In the United States, however, the constitution is the source of all governmental regulations.

The constitution of the United States created a strong central government, which is known as the "Federal Government." Each State, in adopting it, surrendered to this central government a portion of its authority. Among the various functions which are thus delegated to the federal government are the conduct of all international affairs;[3] the carrying on of war; the regulation of foreign and interstate commerce; the coinage of money; the conduct of a postal system; patent and copyright matters; and various other functions which pertain to the nation at large, rather than to any one locality.

[3] All international affairs being within the control of the general government, foreign nations do not recognize the individual States as sovereign nations; yet, although that portion of the sovereignty which pertains to foreign relations is exercised through the federal government, the sovereignty in respect to all matters of mere local importance finds its exercise through the state governments. The sovereignty itself is, of course, in the people; but the people have ordained that it shall be exercised through two different instruments, —the federal and the State governments.

THE RELATION OF THE STATE AND FEDERAL GOVERNMENTS.

32. The powers of the federal government in the United States are limited to those granted to it either expressly or by implication in the United States constitution. All other powers are reserved to the State governments.

The federal constitution contains a grant of powers to the central government. There have been various views entertained as to the proper interpretation to be applied to the instrument; but it is now generally agreed that its construction should be liberal; that the federal government should be allowed to exercise, not only the powers expressly delegated to it, but also all those incidental powers necessary to carry the express powers into execution. The constitution also contains certain restrictions on the powers of the several States; e. g. the rule that no ex post facto[4] law shall be passed.

The State and the federal governments are two distinct parts of the same system. They are vitally united, yet so distinct in their powers that there is no conflict in the exercise of their functions. A particular citizen owes allegiance to the federal government in national matters alone. In all other matters he is under the control of his own State. There is ordinarily no appeal in local affairs from the State to the national government. The decisions of the State courts on matters pertaining to those affairs are supreme so long as they do not encroach upon the powers delegated to the United States or violate the United

[4] An ex post facto law is one which acts retrospectively, making a certain deed criminal which was not so when it was performed.

States constitution. In other words, the State is not a mere instrument of government established by and under the control of the Federal government, but is an independent political organization, equally as permanent, equally as supreme in matters within its jurisdiction, as the general government itself.

SOVEREIGNTY IN THE UNITED STATES.

33. It is a fundamental theory in the United States that sovereignty is in the people; that all governmental powers reside primarily in the whole body of United States citizens.*

* "The powers of the general government, it has been said, are delegated by the States, who alone are truly sovereign, and must be exercised in subordination to the States, who alone possess supreme dominion. It would be difficult to sustain this proposition. The convention which framed the constitution was, indeed, selected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing congress of the United States, with a request that it might 'be submitted to a convention of delegates chosen in each State by the people thereof, under the recommendation of its legislature, for their assent and ratification.' This mode of proceeding was adopted; by the convention, by congress, and by the State legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely on such a subject,—by assembling in convention. It is true, they assembled in their several States; and where else would they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one mass. Of consequence, when they act they act in their States. But the measures they adopt do not on that account cease to be the measures of the people themselves, or become the measures of the State governments.

"From these conventions the constitution derives its whole authority. The government proceeds directly from the people, is 'ordained and established' in the name of the people, and is declared to be ordained 'in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and their posterity.'" McCulloch v. Maryland, 4 Wheat. 316.

This sovereign body, however, exercises its power of governing only through its agents or officers. These officers are selected directly or indirectly by the vote of the people. Once elected, they generally have an independent tenure of office for the period for which they are chosen. They are not merely servants, but agents or representatives of the people. Sovereignty is not delegated to them. That always remains with the people. That which is delegated is the immediate power of exercising certain governmental functions. These officers represent the sovereign body; they do not become sovereign themselves.

DISTRIBUTION OF POWERS IN THE FEDERAL GOVERNMENT.

34. The federal government exercises its powers under the constitution as follows:

(a) Legislative powers are exercised by a congress consisting of

(1) A senate, composed of two senators from each state chosen by the state legislatures.

(2) A house of representatives, composed of members elected directly by the people.

(b) Executive powers are exercised by a president and his subordinate officers.

(c) Judicial powers are exercised by the supreme court, created by the constitution, and by subordinate courts, created by congress.

Under the federal constitution, the national government exercises its powers through three general departments, corresponding in name and character to the three branches of government which we have mentioned in a previous

chapter.[5] The legislative powers are exercised by a congress, which consists of two distinct bodies, known, respectively, as the senate and the house of representatives. The executive power is vested in a president of the United States and his subordinate executive officers. The judicial power is vested in a supreme court of the United States and in such inferior courts as congress may, from time to time, ordain and establish.

The Senate.

The senate is sometimes referred to as the upper house of congress. At the time of the formation of the constitution, there was some difference of opinion as to whether the members of the national legislature should be chosen by the States as such, or by the people directly, without the intervention of the State governments. One of the results of this discussion was the provision that the senate should be made up of two senators from each state, chosen by the legislatures thereof, and this provision was accompanied by a constitutional guaranty that "no State, without its consent, shall be deprived of its equal suffrage in the senate."

The House of Representatives.

Unlike the senate, the members of the lower house are elected by a direct vote of the people; and, for the purpose of securing a proper distribution of representatives, each State is divided into what are called "Congressional Districts," each district electing one representative. The lower house being the direct representatives of the people, the constitution provides that it shall have "exclusive power to originate all bills for the purpose of raising revenue."

The President.

The president is the chief executive officer of the United States government, and as such controls the practical ad-

[5] See ante, p. 24.

ministration of the laws. In addition to his executive functions, however, he plays an important part in legislation. When a bill has passed both houses of congress, it is necessary that it receive his approval before it can become a law, unless, after he has declined to approve it, it be again passed by a two-thirds vote of both houses.* This power of the president is called the "veto power," because he communicates his refusal of assent to any law by writing upon it the word "Veto," meaning "I forbid." The president also has the power, by and with the advice of the senate, to appoint the justices of the various courts of the United States, as well as many of the subordinate executive officers.

The Supreme Court.

The supreme court is the highest court of appellate jurisdiction in the federal system, and is supplemented by various subordinate courts, the nature of which will be explained in a subsequent chapter. One of the most characteristic functions of the supreme court is of a quasi legislative character. In it is vested the power of determining whether the laws passed by congress or any State legislature are in harmony with the federal constitution or not. If congress or a State legislature pass any law in excess of its powers, or in any way conflicting with that constitution, such a law is called an "unconstitutional law," and is void.

THE STATE GOVERNMENTS.

35. The state governments have inherent in themselves all power, except so far as they are limited by their own or the federal constitution.

As to all matters not delegated to the federal government, each State adopts its own system of laws and insti-

* If, however, a bill passed by Congress be neither vetoed nor approved by the president within ten days after its passage, it becomes a law without his approval.

tutions, the only control upon it being that growing out of the constitutional provision that "the United States shall guarantee to every state in this Union a republican form of government." Consequently, although there is considerable uniformity in the governmental systems of the various States, yet on many points there is also much diversity. It is not within the limits of the present work to discuss these differences between the various State systems, but merely to mention some features which are common to all the States.

A State constitution differs radically in its character from the federal constitution. We have seen that the federal constitution is chiefly made up of a grant of powers to the federal government, and that the federal government is limited to the powers given it, either expressly or by implication, by that instrument. In other words, the federal government has no powers whatever except such as are given it by the federal constitution. The State governments have inherent in themselves, however, all power, except so far as they are limited by either the federal constitution or their own. A State constitution, therefore, has for its object the limitation of the powers which the States would otherwise have, while the federal constitution grants to the federal government powers which it would not otherwise possess. An act of congress must not conflict, as we have seen, with the constitution of the United States. A law passed by the State legislature must be put to the test of conformity with (1) the constitution of the United States; (2) with the laws passed by congress; (3) with the treaties entered into by the United States government, which are in the federal constitution declared to be part of the supreme law of the land; and (4) with the constitution of the particular State.

The power of determining whether a State law is or is not in conflict with the State constitution is vested in the highest court of appellate jurisdiction in the State, usually

called the "supreme court" of the State; but if its conformity with the federal constitution, laws, or treaties be questioned, and the State courts decide that it is not in violation thereof, the matter may be taken to the United States supreme court for final decision.[6]

State Legislatures.

In all the States the legislature consists of two bodies, corresponding in their general nature to the national senate and house of representatives. The number of members in the upper house varies in the different States from 9 to 51, and that of the popular branch ranges from 21 to 321. The members of both houses are chosen by popular vote.

The chief executive officer is in every State called the "governor," and his term of office varies in the different States from one to four years. In most States the governor possesses the power to veto any act of the legislature, but in the States of Delaware, North Carolina, Ohio, and Rhode Island no such power is vested in him.

Constitutional Limitations on the States.

The federal constitution contains the following limitations upon State action:

"No State shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of

[6] The federal constitution itself provides that "the constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." Const. art. 6. Therefore any State law which is inconsistent with a law or treaty of the United States is inconsistent with the United States constitution, which declares such laws and treaties to be part of the supreme law of the land.

attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

"No State shall, without the consent of congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of congress.

"No State shall, without the consent of congress, lay any duty on tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power, or engage in war unless actually invaded or in such imminent danger as will not admit of delay."

Interstate Matters.

Congress has jurisdiction over the District of Columbia, all unorganized territories, and over all places purchased by it for forts, arsenals, dockyards, and public buildings. It also has control over various interstate matters, such as the decision of cases arising between citizens of different States, and the regulation of interstate commerce. In 1887, congress passed a law known as the "Interstate Commerce Law," which laid down rules for the regulation of commerce between the States, and created a commission called the "Interstate Commerce Commission," having the powers of a court to administer those rules. The interstate commerce commission is now one of the most important factors in the federal judicial system.

LOCAL SELF-GOVERNMENT.

36. For the purpose of local self-government, the States have divided their territory, and created subordinate political bodies, such as villages and cities, to act as agencies of the State in the local govern-

ment of particular districts. These subordinate bodies are called "municipal corporations."

It has been found desirable by all the States to subdivide their territory for the purposes of local self-government. All the subordinate political bodies created for this purpose, whether in the form of villages, cities, or towns, are called "municipal corporations." This plan of local self-government through public corporations is a natural consequence of the theory of sovereignty in the people. If the people are sovereign, they have a right to govern themselves,—to have home rule.

A municipal corporation is a corporate institution, established by a State as an agency of the State in the local government of particular districts. By a corporate institution or body corporate is meant a collection of individual persons who are organized in such a way that a legal personality results distinct from the members who compose it.[7] This legal personality is possessed of a corporate name by which it is known, and it continues to exist in spite of changes by death or otherwise in its membership. A corporation may be formed, as we shall see hereafter, for the conduct of

[7] The exact nature of a corporation can be best understood by an illustration. Let us suppose that five persons wish to begin the conduct of a certain business, and think it desirable to do this in the form of a corporation. They agree among themselves to purchase a certain percentage of the stock of the corporation as soon as formed. When the corporation is organized according to law, the five members or stockholders do not become identified with the corporation, but are merely in business relations with it. They are stockholders in it, and as such entitled to their share of the profits produced by it, but the corporation is something distinct from them. And so it is with a public corporation. Every citizen is in one sense a member of it, and yet he is not identified with it. The corporation continues to exist, even though he may die or move out of its jurisdiction. The corporation, whether public or private, is, for most purposes, a legal entity. It can act only through its agents or officers.

private business. It is then called a "private corporation;" but we are at present interested in those only which are formed for governmental purposes.

There are three different types of local government in vogue in the United States. In the first, or New England type, which is peculiar to the six New England States, the town is the political subdivision of primary importance. Through its agency the ordinary functions of local government are exercised. In these states there are counties, it is true, but they are little more than judicial districts. The second type, which has been adopted chiefly by the southern States, makes the county the important political unit, while the town or township is assigned to a secondary place.[8] The third type, which is adopted by most of the northwestern States, is a compromise between the "town" and "county" plans. Here both the county and the township are important elements, the local governmental powers being vested in both.[9] For the government of the more thickly populated districts, each of the States has adopted a still different and more complicated system,—that of the city and village; the former in the larger urban localities; the latter in the smaller. Again, for educational purposes, the townships are also divided into school districts. To incorporated cities and villages, it is customary to apply the name "municipal corporations;" school districts are usually classed as "quasi corporations."

All public corporations are the creatures of the State. The State legislature may change or even abolish them at will.

[8] This "county system" of local government is in use in Alabama, Arkansas, California, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nebraska, Nevada, Oregon, South Carolina, Tennessee, and Texas.

[9] This third type is in vogue in Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Virginia, West Virginia, and Wisconsin.

CITIZENSHIP AND NATURALIZATION.

37. No one can be a citizen of a State unless he is a citizen of the United States.

38. Citizenship of the United States renders a person a citizen of the State in which he resides.

39. Citizenship in the United States may be

(a) By nature; that is, where one is born within the territorial limits of the United States, and subject to the jurisdiction thereof.

(b) By naturalization; that is, where a foreigner renounces his allegiance to his sovereign, and becomes a citizen of the United States, in accordance with their laws.

Under the Articles of Confederation, there was no such thing as citizenship of the United States. Citizenship was a State matter exclusively. In the constitution, however, citizenship of the United States is repeatedly referred to; and in the fourteenth amendment, State citizenship is also mentioned. No person can be a citizen of any State unless he is also a citizen of the United States.[10] If, however, he is a citizen of the United States, he becomes, by virtue of such citizenship, a citizen of the State in which he resides.

Citizenship in the United States may be by nature or by naturalization. Citizenship by nature is the result of birth within the territorial limits of the United States, and subject to the jurisdiction thereof. The process of natural-

[10] Cooley, Const. Law, p. 244.

ization is available to any free white persons and to persons of African nativity or descent.[11]

Naturalization is covered by the following rules: (1) The applicant must declare on oath two years prior to his admission that it is his bona fide intention to become a citizen of the United States, and that he renounces all allegiance to foreign powers. (2) At the time of his admission, he must have been for five years a resident within the United States, and at least one year in the State or territory where he is admitted. (3) He must renounce any title of nobility which he may possess. (4) He must declare on oath that he will support the constitution of the United States. (5) The country from which such alien comes must not, at the time he seeks to be naturalized, be at war with the United States. (6) The applicant must be a person of good moral character. (7) Minor children of naturalized citizens are citizens of the United States, if they reside within the United States at the time of the naturalization of their parents.

[11] Rev. Stat. U. S. § 2169. By special treaties, members of certain Indian tribes have been accorded the privilege of becoming citizens. Such a treaty was entered into with the Choctaws in 1830 and with the Cherokees in 1836.

CHAPTER IV.

THE UNWRITTEN LAW.

40–41. In General.
42–45. The Roman Law—Codification.
46. The Common Law.
47–48. Customs—Stare Decisis.
49–51. Its Development—Fictions—Equity.
52. The Law Merchant.
53. The Canon Law.
54–56. Unwritten Law in America.

IN GENERAL.

40. All important systems of municipal law are made up of two elements, known, respectively, as the "unwritten law" and the "written law."

41. The unwritten law of any country is that portion of the municipal law of that country which is not formally prescribed by the legislative branch of government or embodied in a written constitution, while the written law is that part which is expressly laid down by the legislature or adopted in express terms as the constitution of the state.

Not all municipal law is actually prescribed by the legislature of the state. That body, it is true, may make any law it sees fit, unless restricted by constitutional rules. But the law must have principles to govern every condition in which men are placed, and every relation which they bear to other men. When the complexity of modern civilization is considered, it becomes plain that these principles must be of an almost infinite variety and number. No legislature

could, unless gifted with superhuman energy and foresight, prescribe laws to meet every state of facts which might arise within its jurisdiction. It will be found, therefore, that only a small proportion of the laws of any country are laid down directly by the lawmaking body. We may therefore divide the municipal law of any state into two kinds: (1) The written law, which is the direct result of legislation; and (2) the unwritten law, which is derived from other sources, and which will be explained in the present chapter.

It is not to be understood that the unwritten law is at all times strictly without written form. It receives its name because it was not originally written. When a legislature passes a law, it is immediately recorded, and usually published in exact words, before it takes effect. Such a law is therefore in the strictest sense written. With laws of the other class, however, it is not necessary to their operation that they should be recorded at any time, and they are seldom written down except in the reports of judicial decisions and in the works of commentators.

The place of the unwritten law in the legal system is not difficult to understand. Courts,[1] which are the instruments used by the judicial power in the exercise of its functions, may be said to be the mediators between law and fact. They are first confronted with a state of facts, to which they must apply some legal rule. In a large majority of cases the legislative power has furnished no rule governing the case. But the courts do not deny justice to the suitors on that account. They reason that the sovereign body must have contemplated a rule for every case, and that such a rule, when not prescribed by the legislature, must be looked for else-

[1] A "court" is said by Blackstone to be "a place where justice is judicially administered." Its power to hear cases and judicially determine them is called its "jurisdiction."

where. In determining the proper rule to apply to the particular case, the courts look for guidance to the unwritten law.[2]

THE ROMAN LAW—CODIFICATION.

42. Two great systems of unwritten law have been developed in the history of the Aryan races: the civil law of ancient Rome and the common law of England. The laws of every civilized nation of Europe and America are based upon one or the other of these two systems.

43. The civil or Roman law (jus civile Romanorum), in its general sense, includes all the laws that were in force in Rome at any time during its history. But the term "civil law" is usually applied in a more restricted sense to that system which is embodied in the compilations made in the reign of the Emperor Justinian, during the sixth century A. D.

44. By the term "codification" is meant the reduction of rules which have previously existed only as unwritten law to written form, and their enactment by a legislative body. Rules thus enacted have the same force as other parts of the written law.

45. The civil law, in the form given it by the compilation or codification of the Emperor Justinian, lies at the base of the legal systems of all of the nations of continental Europe.

[2] For a further discussion of the general character of the unwritten law and its relation to the other parts of the municipal system, see Holland's Jurisprudence, c. 5; Markby's Elements of Law, c. 2.

In the form in which it comes down to us, the Roman law, being codified, must be regarded as a system of written law. But in this condition it is merely the crystallization of that which it took centuries to develop, and until it reached this final form the unwritten law was its most important element, as it must needs be in any desirable legal system. The growth of the Roman law begins with the beginning of Roman history. Its first authentic records are the laws of the Twelve Tables, which, though established as early as the year 450 B. C., yet were regarded as the foundation of the Roman law until the time of Justinian. The first five centuries of the Christian era constituted the period during which the civil law was molded into the form in which we find it in Justinian's reign. It seems to have been chiefly made up of (1) the constitutions, or decrees and edicts and authoritative commands of the emperor; (2) the acts of the senate; (3) the laws of the people (plebiscita), passed in the popular assembly; (4) judicial decisions; (5) the judgments of magistrates; and (6) the responsa prudentium, or the opinions and writings of jurists.[3]

[3] The Justinian Code consists of the following compilations: (a) The Early Code. Justinian first ordered a compilation of the imperial constitutions. This compilation, called the "Codex Vetus," or "Early Code," was completed and promulgated as law in the year 529 A. D. None of it has been preserved. (b) The Pandects or Digest. The Early Code having been completed, Justinian next appointed sixteen persons to revise and codify the entire civil law with the exception of the constitutions. This work was completed in three years, and the New Code was published in 533 in fifty books under the title "The Pandects." (c) The Institutes. These consisted of a still later work, also published in 533, designed as a text-book for the study of the law. It was hardly more than a revision of the work of an earlier jurist named Gaius. Although it was primarily an elementary treatise, yet it was of equally binding force upon the people as the more pretentious works. (d) The New Code. This was a revision of the Codex Vetus, made desirable by the large number

Previous to the reign of Justinian, the Roman laws had several times been reduced to the form of a code. The principal compilation of this kind was that of Theodosius, in the fifth century A. D. But to Justinian we are indebted for the final compilation of the laws into a code so systematic and perfect that it is still regarded, after the lapse of nearly fourteen centuries, as a most magnificent monument of legal reason.

It is a striking fact that not one of the nations on the continent of Europe has produced an independent legal system. The states which composed the Holy Roman empire, regarding themselves as the legitimate successors of the Roman name and dignity, naturally held to the Roman law. And the other nations which had at one time or another been subject to the Roman arms, adopted the civil law as their inheritance when the Roman empire fell.

THE COMMON LAW.

46. The common law is that system of unwritten law which grew up in England, and forms the basis of the English legal system.

England has the distinction of being the only nation of modern times which has evolved an independent system of unwritten law. The early English lawyers were accustomed to regard this system as of high antiquity, sometimes assert-

of new constitutions promulgated by Justinian since the compilation of that work, and it was published in 534. (e) The Novels. After the publication of the New Code, Justinian still continued to issue constitutions in such number that, upon his death, a separate collection of them was made. Many of them created material changes in the previously existing law. The new collection was published under the name of the "Novellae Constitutiones," or "New Constitutions." They are now usually referred to as the "Novels."

ing that it was as old as the native Britons. But Blackstone justly remarks that to the ancient British laws were added many of the customs of the Romans, the Picts, the Saxons, the Danes, and the Normans, "thereby, in all probability, improving the texture and wisdom of the whole by the accumulated wisdom of divers particular countries." At about the beginning of the eleventh century there seem to have been three different systems in vogue in the kingdom: (a) The Mercian laws; (2) the West Saxon laws; and (3) the Danish laws,—each having its distinct territory where it was observed. It is said that out of these three systems King Edward the Confessor extracted a uniform system which was thereafter observed throughout the whole kingdom. To this system, because it was of such general scope, the name "common law" was applied.[4]

SAME—CUSTOMS—STARE DECISIS.

47. The most important source of the common law lies in those customs which, growing up in a community, and becoming crystallized by time, are regarded as of legal force in the absence of more authoritative rules.

48. By the common-law doctrines, a rule of law, whether based upon custom or not, when once recognized by the courts and applied to a case, forms a precedent, and should be followed in all similar cases thereafter, unless flatly absurd or unjust, or unless repealed by legislation. This is called the "doctrine of stare decisis."

In legal theory, a custom, to be entitled to recognition as law, must have been: (a) In existence for time immemorial.

[4] Blackstone, Comm. Int. § 3.

It must, in the quaint words of Blackstone, "have been used so long that the memory of man runneth not to the contrary." (b) It must have been continued; that is, it must have been constantly observed whenever an occasion for its observance arose. It must not have given place to other customs inconsistent with it. (c) It must have been peaceable; that is, it must have been acquiesced in without dispute. (d) It must be reasonable; that is, it must not be inconsistent with the general spirit of the law. (e) It must be certain; in other words, it must not be vague or indefinite in its character. (f) It must have been compulsory; that is, it must have been regarded as binding upon all persons to whom it applies. (g) It must be consistent with all other customs.

Whenever the written law failed to provide a rule to govern a case, the common-law judges were expected to take the necessary rule from the customs of the community. The recognition of the legal force of custom is a practical recognition of the right of the people to be consulted in the making of the laws. Such recognition is very infrequent, except in those countries where the people have attained more or less practical freedom. It is in itself a step towards liberty.

Early in the history of the common law the courts began to preserve records of their decisions, and it became habitual, when the unwritten law was to be resorted to, for the judge to examine the reports of previous cases to see if the same matter had not already been considered judicially. It was much easier to do this than to go through the process of determining what the custom was directly. This habit of the judges itself grew into a custom, and finally it became a rule with the courts that the decisions in previous cases should govern whenever they were applicable to the case in hand. This rule gave greater certainty to the law. The people might know, from what had already been decided, the rule which would govern their own actions. The reported de-

cisions have become so numerous that at the present time original customs are resorted to so infrequently that modern lawyers often forget that they are the basis of the common law. It may be said that the common law is embodied in the cases, and, when a state of facts arises for which there is not a precedent, there is usually some general principle running through the law from which a rule may be deduced, or a case from which a rule may be extracted by analogy. Evidence of a custom which has not already been judicially recognized is seldom resorted to. The authority of adjudicated cases tends more and more to exclude all other sources of authority as time goes on.

SAME—ITS DEVELOPMENT—FICTIONS—EQUITY.

49. The development of the common law has been materially aided by the use of legal fictions, and by the system known as "equity."

50. A legal fiction is the assumption by a court that certain things are true which are in reality either partially or wholly false.

51. Equity is a supplementary legal system, which, by reason of the elasticity of its rules, serves to correct the tendency towards undue harshness resulting from the inflexibility of common-law principles.

Whenever rules become fixed, growth ceases. But it is desirable that a system of law should keep pace with the growth and civilization of the race which it governs. In the history of the common law there have been many times when principles have been outgrown, as it were, by the people to whom they applied. The courts recognized this, yet

the rules were so firmly rooted in the law that it would be well-nigh revolutionary to uproot them. Legal fictions were resorted to. For example, at the common law, there was a form of action called "trover," which lay for the recovery of damages against a person who, having found the goods of the plaintiff, refused to give them up when asked to do so. But cases would come up in which the defendant had the goods of the plaintiff, and refused to give them up, but in which the defendant had not found the goods, but had become possessed of them in some other way. The essence of the action of trover was the finding of the goods. Should the judges turn the suitor away because it happened that the defendant had perhaps stolen the goods instead of finding them? No; the judges said that they would assume that he found them, whatever the real facts were, and would give the plaintiff damages if he could prove that the defendant had wrongfully converted the goods, and would not deliver them to the rightful owner. And to this day an action of trover proceeds upon the fiction that the goods were originally found. The rationale of fictions is this: The law first becomes so fixed that its modification is impracticable, although extremely desirable. The judges note the desirability of certain changes, and, by assuming a state of facts which does not in fact exist, bring those changes about. While the dry, hard shell remains the same, the spirit within is changed to meet the demands of the times.

The existence of an equity system in England is also due to a realization of the inflexibility which is characteristic of a rule of law when it once takes upon itself a permanent form. A similar system was developed in Rome, and we may regard it as necessary to the attainment of the fullest justice that some equitable rules exist in any collection of laws. The name "equity" implies that the design of the system is justice; but it is not every man's idea of justice that

will be administered under the system. It is rather the technical justice of the courts, which is governed by rules nearly as rigid as those of the common law proper. The equity system will be discussed at length in a subsequent chapter.[5]

SAME—THE LAW MERCHANT.

52. The "law merchant" is the name applied to a collection of customs which were observed by merchants and other business men in their dealings with each other. They are now regarded as fully adopted into the common law.

It is a principle of the common law that particular usages are frequently to be recognized and enforced, although they may even be contrary to the ordinary legal rule. This principle sometimes goes so far as to lead the courts to change the ordinary meaning of words to conform with a certain usage. These usages may be local,—that is, confined to a certain locality,—or they may apply to a particular class of persons. The law merchant was of the last-mentioned class. It was a system of customs which were often contradictory to the regular common-law rules, and which yet the courts would enforce in controversies between merchants who were in the habit of observing them. As time advanced, however, they became gradually grafted into the common-law system, until to-day they are as much a part of the common law as are any of that system's principles. The adoption of these customs into the common law is a fair example of the way custom develops into law; first perhaps as a mere particular usage, then becoming general in its character, and finally receiving recognition as law from the legal tribunals.

[5] See post, c. 5.

THE CANON LAW.

53. The canon law was that part of the Roman law system which governed ecclesiastical affairs. It is used by the English ecclesiastical courts in the administration of their judicial functions, and may in a sense, therefore, be regarded as having been adopted into the common law.

In its original form, as a part of the Roman law, the canon law was in the main a written system. But it is hardly necessary to say that it does not derive its authority in England by virtue of its promulgation by a foreign power. It is administered in the English courts in the same manner as ordinary unwritten law, its Roman law form being regarded as merely furnishing evidence of what the law is. As the law merchant is a collection of customs previously existing which have been adopted bodily into the common law, so the canon law is a system of laws which have been adopted in toto by the English courts.

UNWRITTEN LAW IN AMERICA.

54. In the United States, the Federal government does not possess a complete unwritten legal system. When the Federal courts are called upon to decide a case to which no written laws apply, they distinguish between matters of local law and matters of general law. If the case involves a matter of local law, they are guided by the law as it exists in the State where the cause of action arose. If it involves a matter of general law, they exercise an independent judgment, and are not bound by the decisions of the local courts.*

* The thirty-fourth section of the Judiciary Act of 1789 provides that:

"The laws of the several States, except where the constitution,

55. The English common law is adopted, so far as suited to American institutions, as the unwritten law of all of the States of the United States except Louisiana.[6] In that State the Roman law prevails.

treaties or statutes of the United States shall otherwise recognize or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."

In the leading case of Swift v. Tyson, 16 Pet. 1, Story, J., settled the construction of that section in the following words:

"In all the various cases which have hitherto come before us for decision, this court has uniformly supposed that the true interpretation of the thirty-fourth section limited its application to State laws strictly local; that is to say, to the positive statutes of the State, and the construction thereof by the local tribunals, and to rights and titles to things having a permanent locality, such as rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the State tribunals are called upon to perform the like functions as ourselves; that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not apply to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence."

See, also, Railroad v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914; Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10; Railroad Co. v. Lockwood, 17 Wall. 357; Hough v. Railroad Co., 100 U. S. 213.

[6] In Louisiana, in criminal matters, the common law has been adopted. See Clark, Crim. Law, p. 18; Rev. Laws La. art. 976.

56. Owing to the total separation of church and state in this country, the canon law, as a system, is of no legal force in the United States, although some of its principles have been adopted into our common law.[7]

In their character of English colonies, those States which afterwards organized the United States government were subject to the English common law. Many of the colonists were emigrants from England, and were therefore accustomed to that system even before they came under its control in America, so that at the time of the Revolution the people of the colonies knew no laws except those which came to them as a birthright from their fatherland. It was but natural that they should continue the same system to which they had been accustomed, for a change in a system of laws is a far more serious matter, more difficult to accomplish, and more grave in its results, than even a change of governmental forms. In Louisiana, that State having been a French province up to the time of its admission into the Union, and therefore having been subject to the Roman law in its French form, the same reasons which led the other States to adopt the common law induced the people to adopt the Roman system as the basis of their laws.[8]

[7] For example, the law forbidding adultery has been adopted from the canon law, as administered by the English ecclesiastical courts, into the common law of many of the states. See Clark, Crim. Law, pp. 312, 313.

[8] Traces of Roman law influence are also apparent in the laws of Florida, Texas, and other southern States.

CHAPTER V.

EQUITY.

57–59. Equity Courts and their General Jurisdiction.
60–62. Specific Character of Equity Jurisdiction.
63–75. The Maxims of Equity.

EQUITY COURTS AND THEIR GENERAL JURISDICTION.

57. The English equity system was administered by a court known as the "High Court of Chancery."

58. In this country, equity jurisdiction is in some States vested in a distinct court. More frequently it is exercised by the same tribunals which administer the common law, such tribunals sitting as courts of law and courts of chancery alternately. In some states, however, the distinction between actions at law and suits in equity has been abolished.

59. In England and in this country it is a rule that the chancery or equity courts have jurisdiction only in cases for which the ordinary law courts furnish no adequate remedy.

In order to understand the precise nature of equity as it exists to-day, it will be necessary to refer briefly to the conditions under which the English court of chancery arose, and to trace its development until it became an established factor in the judicial system of that country. In the year 1066, William the Conqueror ascended the English throne. His rule was firm. We would regard it at the present time as despotic. One of the doctrines which he asserted and acted upon was that the king was the fountain of all justice; that the courts of the country were limited at all times by the

royal will. Under this doctrine, William and the kings who followed him often personally dealt out justice irrespective of the courts. The common-law courts were at this time limited very strictly in their jurisdiction. Certain forms of action were in use, but, unless a person's wrong was of such a nature that one of these actions applied to it, the courts were powerless to grant a remedy. These forms of action were neither comprehensive nor flexible; and many suitors, after they had been refused justice when they applied for it to the courts, would at last appeal to the king, in his character of fountain of justice, for relief.

The most important of the king's great officers was the chancellor. He was an officer of the church, the king's confessor, and the keeper of the great seal of the kingdom. He was also said to be the keeper of the king's conscience, and, moreover, had certain duties in connection with the law courts. As the confidential adviser of the king, he was undoubtedly at all times consulted in regard to the petitions of subjects who wished the king to exercise his extraordinary legal powers in their behalf. And when these suitors became so numerous that the king was unable to attend to their complaints in person, the entire charge of these matters was turned over to the lord chancellor; and that personage soon became the chief officer of an important court in which these petitions were heard and determined, viz. the chancellor's court, or the court of chancery.

In rendering his judgments the chancellor was at first bound by no rules except such as his conscience dictated, unless there were statutes applicable to the cases. But he was, as we have seen, an ecclesiastic, and as such was educated in the principles of the Roman law. Very naturally he found in that system many rules to determine him in his decisions; hence we are accustomed to regard the equity system as being more indebted to the Roman law than to any other source. Still the chancellor did not feel bound to ob-

serve its principles unless they were consonant with his own ideas of justice.

From the fact of the extraordinary character of the wrongs which the court of chancery assumed to redress, there was much less chance for the application of the doctrine of stare decisis, or precedent, in the equity system than in the common law. The decisions of the successive chancellors were reported, however, and they appear to have felt themselves bound by the prior decisions of the court whenever cases arose to which they applied. There thus grew up an extensive system of law supplementary in its character to the common law proper. The jurisdiction of the chancery court tended to broaden as common-law rules grew more and more inflexible on account of the rigid adherence to precedent on the part of the judges who administered them. This tendency gave rise to a feeling of jealousy on the part of the common-law judiciary, who succeeded in procuring the passage of a statute extending their own jurisdiction so that it was not limited to the precise actions to which it had previously been confined, but could be exercised in all similar cases; and as the old theory that the chancellor was the representative of the king in his capacity of fountain of justice began to lose ground, and it became less presumptuous to limit his jurisdiction, it became a recognized rule that the court of chancery could not be resorted to except in cases where the ordinary common-law courts gave no adequate remedy. This is now one of the fundamental rules of the equity system.[1]

The system of equity was adopted in most of the States of the United States substantially as it was administered by the English court of chancery. Jurisdiction in equitable as

[1] The chancellor began to exercise judicial authority in the reign of Richard II., but it was not until the time of Henry VI. that his decisions began to be reported. See 2 Reeves' History of the English Law, 466, 600.

well as legal causes is conferred upon the courts of the federal government by the United States constitution. But the federal judicial system did not and does not maintain a separate chancery court. It has seemed wise to allow the common-law judges to administer equitable remedies as well as to dispense strictly legal relief, not discarding the equity procedure nor equity principles, but applying them at stated times when they sit as chancery judges. Thus it will be observed that the same court will at one time be styled the "Circuit Court of the United States," and at others the "Circuit Court of the United States, in Equity." This plan is adopted by at least half of the States of the Union.

The abolition of the distinction between actions at law and equitable suits has been brought about in those States which have adopted what is known as the "Code Procedure." Under that system there is allowed ordinarily only one form of action, which applies to every case, whether of a legal or equitable nature. This change usually applies, however, to the remedy merely, and it should by no means be understood that its effect is to abolish the equity system. Most equitable doctrines are applied under the codes as fully as they were in the old English chancery court.[2]

[2] Separate courts of chancery exist in the States of Alabama, Delaware, Kentucky, Maryland, Mississippi, New Jersey, and Tennessee. Equity jurisdiction is exercised by the common-law courts in conformity with chancery rules in Arkansas, Connecticut, Florida, Georgia, Illinois, Iowa, Maine, Massachusetts, Michigan, New Hampshire, North Carolina, Oregon, Pennsylvania, Rhode Island, Texas, Vermont, Virginia, and West Virginia. The distinction between legal and equitable remedies has been abolished in New York, Missouri, Minnesota, California, Indiana, Ohio, Wisconsin, South Carolina, and other western States. But although in the States last mentioned there are no separate equitable actions, the system of equity is none the less operative. Equitable remedies remain in full force, but are applied in accordance with the same procedure as those of common law.

SPECIFIC CHARACTER OF EQUITY JURISDICTION.

60. Although the rules of equity depended originally to a large extent upon the sense of justice entertained by the chancellor, at the present time the equity judges are limited in their discretion by a large body of rules and maxims. They are practically as much restricted in their powers as are the judges of the courts of law, although their remedies are of a kind more easily adjustable to the circumstances of particular cases.

61. The larger proportion of equitable cases are those in which property rights are involved. Equity has no jurisdiction whatever in criminal matters.

62. The jurisdiction of the equity courts is said to be, as to some matters, exclusive of common-law jurisdiction, as to others concurrent with it, and as to some merely auxiliary to it.

This last proposition may seem inconsistent with the principle that equity powers are confined to cases to which the law courts are unable to apply an adequate remedy. But the inconsistency disappears when emphasis is laid upon the fact that the common-law remedy must be adequate if the equity courts are to have no jurisdiction. On many matters—as those growing out of fraud—both common law and equity may be resorted to, the choice of the suitor depending upon whether he is content with a mere award of damages or feels himself entitled to relief of an equitable character. For example, the common-law courts cannot set aside a deed because it was fraudulently procured; but equity is able to do this, and in many cases it is the only adequate remedy. This is an example of the concurrent jurisdiction of the equity courts.

One of the most important examples of the auxiliary jurisdiction is what is called the "perpetuating of the testimony of witnesses." If a witness in an action at law is expected to die before the trial of the cause, or for some other reason will be unable to testify at that time, equity will often lend its aid by taking his testimony at once, in order that injustice may not be done by its absence at the trial. This auxiliary jurisdiction is also sometimes called "assistant jurisdiction." [3]

THE MAXIMS OF EQUITY.

63. A maxim is a concise statement of a fundamental truth or principle.

64. The maxims of equity are those maxims in accordance with which the remedies of the chancery courts are applied.

These maxims are so uniformly observed that the most important of them form a sort of constitution or fundamental law for the equity system.

65. "Equity will not suffer a wrong to be without a remedy."

This maxim is of the utmost importance, for it is the key to the whole system. Equity took its rise from the inability of the common-law courts to give full justice, and by asserting this principle it developed its peculiar system. Not only will it not suffer a wrong to be without a remedy, but it will see that the remedy is an adequate one.

[3] The leading subjects over which equity has jurisdiction are trusts and trustees, foreclosure of mortgages, accident, mistake, account, specific performance, partition of joint estates, interpleader, and injunctions. For discussions of these subjects, consult Bispham or Story on Equity.

66. "Equity follows the law."

That is, equity will observe legal rules so far as it can do so without hindering the application of its peculiar remedies.

67. "Where the equities are equal, the first in time shall prevail."

In other words, where there is no ground for decision in the character of the rights themselves, that right which has existed longest shall be enforced.

68. "Where there is equal equity, the law must prevail."

This maxim signifies that where the two parties have equal rights, but one of them has also a right at the common law which the other has not, the former is entitled to have his legal right enforced. He would, therefore, be sent back to the law courts for his remedy.

69. "He who comes into equity must do so with clean hands."

For example, if he claims fraud, he must himself be free from fraud, or the court will not listen to him.

70. "He who seeks equity must do equity."

Not only must he have clean hands, but he must be willing to do all that is right and fair in the transaction.

71. "Equity aids the vigilant, not the indolent."

Consequently it will not encourage a man in "sleeping on his rights." If he wishes to receive aid from the equity courts, he must be prompt in applying to them.

72. "Equity imputes an intention to fulfill an obligation."

That is, when a man promises to do a certain thing, equity will assume that he intended to do it, until the contrary is shown; and, if he does something which may be regarded as a partial fulfillment of such a promise, equity will so regard it.

73. "Equality is equity."

For example, if equity should be called upon to apportion either assessments or dividends among several, it would apportion them equally, as far as possible.

74. "Equity looks upon that as done which ought to be done."

Thus, if a contract is made and broken, and the breach is of such a nature that there is no adequate remedy at law, equity will grant what is known as "specific performance of the contract." Even though the complaining party has not performed all that he had promised, equity will assume that he has done so, for the purposes of the granting of the specific performance, in many cases.

75. "Equity acts in personam."

That is to say, when it renders its decree, it directs the various parties to perform such acts as are necessary to the doing of complete justice in the case; and, if they refuse to obey the directions of the court, they are guilty of contempt of court, and punished personally. A law court, on the other hand, would merely enter judgment, which is available against the person's property, rather than against the person himself.

CHAPTER VI.

THE WRITTEN LAW.

76–79. In General—Statutes.
80. Relation to the Unwritten Law.
81–83. Statutes—How Enacted.
84. Constitutionality.
85–87. Affirmative and Negative.
88–90. Declaratory and Remedial.
91–93. Public and Private.
94–96. General and Local.
97–99. Mandatory and Directory.
100–102. Prospective and Retrospective.

IN GENERAL—STATUTES.

76. The written law of England consists of the acts of parliament.

77. The written law of the federal government in the United States consists of the federal constitution, the treaties made by its authority, and the acts of congress.

78. The written law of each individual State consists of its own constitution and the rules enacted by its legislature.

79. STATUTES—All laws laid down by a legislative body, whether by parliament, congress, or a State legislature, are called "statutes." A "statute" may be defined as a law which a legislature creates by a single formal enactment.

The fact that England has no "written constitution" in the sense in which the term is used in America has been

noticed. The English constitution is therefore part of the unwritten law of England. In Germany, on the other hand, the constitution is written, as it is likewise in France and a number of other modern states. It was in America, however, that the idea of reducing constitutions to written form was first adopted and put into extensive practical operation. Written constitutions are usually revolutionary; that is, they usually follow a change of governmental form. It is with constitutions as it is with ordinary laws,—so long as the usual customary rules suffice, they are left in their unwritten form; but, when any radical change is desired, the more definite, positive rules of the written law are called into being.

England's only written law is that which is enacted by parliament. But in the United States we have not only our constitutions as part of the written law, but also the treaties which are made by our government with other nations. Treaties are, ordinarily, merely a part of the international law;* and they would not be a part of the municipal law of this country were it not for the clause of the federal constitution which provides that "this constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." [1] The effect of this provision is to make treaties a part of the mu-

*All international law is, in one sense, part of the law of the land; for, when a nation becomes bound to observe international law rules, it will ordinarily require its own subjects to refrain from violating them. Thus, the common law recognized certain crimes against the international law as a violation of its own principles.

[1] Const. U. S. art. 6.

nicipal law of the United States; and, as they are created and promulgated in definite written form, they are a part of the written law.

Each State of the United States also has its constitution, which is part of the written law of that State. The constitutions of the States and of the United States, while forming the fundamental law of the land, deal only with those principles which lie at the base of our institutions, and form only a small part of the written law. The constitutions consist largely of general rules; statutes are specific, descending to particulars, and are necessarily much greater in bulk. From the fact of the prominence of the statutes, the whole body of the written law is often referred to, though inaccurately, as "statutory law." "A statute" is one of the units of which the statutory part of the written law is composed. It may consist of a single rule of law, or of a collection of rules which are enacted at the same time, and which usually refer to the same subject-matter.

RELATION TO THE UNWRITTEN LAW.

80. The written law supersedes the unwritten law so far as they are inconsistent with each other.

The written law is invariably the result of some definite, authoritative act of creation on the part of the government of a state. The process of growth which is so characteristic of the unwritten laws is absent, and, in its stead, there is the certainty of an express act. The great mass of the law is, as we have seen, unwritten. We have also seen that the unwritten law has within itself the power of change. But its changes are necessarily gradual, and often prove inadequate to the demands of the times. By legislation, on the other hand, the law may be changed instantaneously.

Important changes must be made in this way, and it is the most convenient and certain way of making any change which is desired. As Mr. Holland remarks: "Legislation tends, with advancing civilization, to become the nearly exclusive source of new law."†

When a statute is passed the object of which is to change some part of the unwritten law, however, that part of the unwritten law is seldom expressly repealed. Indeed, it is seldom noticed at all in the statute. The legislature proceeds as if no law governing the subject existed. The courts, therefore, being bound to recognize the superior force of the express will of the legislature, apply the rule that, wherever a rule of the unwritten law is in conflict with a statutory or constitutional provision, the latter will govern, the former becoming invalid.

STATUTES—HOW ENACTED.

81. A statute, to be valid, must be enacted in conformity with the provisions of the constitution, and, unless so enacted, it is void; but it is not necessary to its validity that the rules of parliamentary law, nor even the special rules of the body which enacts it, be strictly followed.

82. Before its passage by the legislature, the proposed statute is called a "bill;" after its passage, it is often referred to as an "act."

83. The successive steps in the enactment of a statute are usually as follows: (1) Introduction of the bill in either house; (2) reference to a committee; (3) three readings on different days; (4) the vote; (5) signature by presiding officer; (6) presen-

† Holl. Jurisp. p. 65.

tation to the other house, where the same procedure is repeated; (7) signature of the executive in those states where it is necessary; and (8) reconsideration, in case the executive veto it.

In order that its proceedings be valid, it is, of course, indispensable that the legislature itself be constituted in conformity with all constitutional provisions. If it is not so constituted, it is not a legislature. Furthermore, if there are any rules in the constitution regulating the method of creating laws, such rules must also be followed. Constitutions usually contain such general regulations, concerning the enactment of laws, as shall insure a sufficient deliberation upon the bill before its passage, and make certain that it represents the genuine intention of the legislative body before it becomes a law. In respect to all other matters which are not the subject of constitutional provision, legislatures are subject to only such rules as they may prescribe for themselves or choose to recognize. The rules of the system known as "parliamentary law" are usually followed, except as to those matters in regard to which particular legislatures adopt special rules designed to meet their own peculiar wants. Inasmuch as the legislature has full power to change these rules whenever it may see fit, if a particular statute is enacted by it in conformity with all constitutional provisions, such a law will be upheld, even though the special rules of the legislative body or the general parliamentary law were not observed in its passage.[2]

As a rule, bills may be introduced in either house of the legislature, but it is customary for constitutions to provide that bills for raising revenue must originate in the lower

[2] People v. Hatch, 33 Ill. 9; State v. Brown, 33 N. C. 141; McDonald v. State, 80 Wis. 407, 50 N. W. 185.

house.[3] The reason of this is that the lower house, being invariably the most numerous branch of the legislature, is regarded as better fitted to guard wisely the rights of the people in all matters which may result in taxation. When the bill is introduced, it is usually referred to the committee whose business it is to carefully consider bills of that particular class. By this reference to a committee, it is supposed that the bill will receive more thorough consideration than it is possible for the entire legislature to give it. After its consideration by the committee, the bill is referred back to the house, with the results of the committee's investigations. If the committee recommend that the bill be not considered by the house, it is usually dropped. If, however, the committee report favorably upon it, the bill is put to its three separate readings, and, after such debate as may be necessary, is voted upon. If passed, it is signed by the presiding officer, and presented to the other house of the legislature. Here it passes through substantially the same procedure, and, if it receives the approval of this house, it becomes a law, provided the executive gives it his approval. If, however, it is vetoed by the executive, in order to become a law in spite of such veto it is necessary that it be again passed by a two-thirds vote of both houses.

SAME—CONSTITUTIONALITY.

84. No State statute is of any validity which lays down rules inconsistent with any provision of the constitution of the United States, or of the State by whose legislature it is enacted. All laws passed by the congress of the United States must conform to the federal constitution. Statutes which do not conform to this rule are unconstitutional and void.

[3] Const. U. S. art. 1, § 7.

As we have already seen, the power of determining whether a statute is constitutional or not is usually vested in the highest courts of last resort.

SAME—AFFIRMATIVE AND NEGATIVE.

85. As to their form, statutes are either affirmative or negative.

86. An affirmative statute is one which is enacted in affirmative terms.

87. A negative statute is one which is expressed in negative terms.

The effect of an affirmative statute is not necessarily to supersede the common law upon the same subject-matter, for it is so worded that it is not necessarily inconsistent with the common-law principles. Against negative statutes, however, the rules of the unwritten law are of no effect. The difference in operation between the two classes of statutes is illustrated by a learned writer as follows: "If a statute were to provide that it should be lawful for a tenant in fee simple to make a lease for twenty-one years, and that such lease should be good, an affirmative statute could not restrain him from making a lease for sixty years; but a lease for more than twenty-one years would be good, because it was good by the common law; and, to restrain him, it ought to have words negative, as that it shall not be lawful for him to make a lease for above twenty-one years, or that a lease for more shall not be good." [4]

[4] Potter's Dwar. St. 70.

SAME—DECLARATORY AND REMEDIAL.

88. As to their relation to the common law, statutes are either declaratory or remedial.

89. A declaratory statute is one which merely affirms principles which already existed under the common law.

90. A remedial statute is one which modifies the principles already existing under the common law.

In legal theory, there is a rule to govern every state of facts; and, if this rule is not to be found in the written law, it will be found in the unwritten. Theoretically, therefore, the legislature never creates a rule absolutely new. It either affirms or modifies a rule already existing. It is not to be understood that this rule is always to be found in the reports of adjudicated cases. It may never previously have been applied to a state of facts. But it is plain that, even had no statute been passed upon the subject, if a case had arisen which required its application the courts would have found it and applied it. The class of remedial statutes includes, therefore, all statutes which do not merely affirm unwritten-law principles.

SAME—PUBLIC AND PRIVATE.

91. As to the persons to whom they apply, statutes are either public or private.

92. A public statute is one which is applicable to the public generally.

93. A private statute is one which relates to a single person, or a particular class of persons, and does not apply to the whole community.

The distinction between public and private statutes is ordinarily clear. For example, a law of congress granting a pension to a particular person would be a private statute; while a law providing for the bestowal of pensions upon all who conform to certain conditions is public. But it sometimes occurs that a statute partakes of both a public and private character. The essential character of such a statute is then a matter of determination by a court. Its determination sometimes becomes of importance, for courts will take "judicial notice" of a public statute; that is, they will not require it to be proven by the party who alleges its existence. A private statute, on the other hand, must be proven, as well as any other fact essential to the case in which it arises.

SAME—GENERAL AND LOCAL.

94. As to the territory to which they apply, statutes are either general or local.

95. A general statute is one which applies to the entire territory over which the legislature has authority.

96. A local statute is one which applies only to a limited portion of the territory over which the legislature has jurisdiction.

The classification into general and special statutes is sometimes confused with that into public and private. The first involves a distinction of persons; the latter, a distinction of place. A local statute may be public, and it is not impossible to conceive a private statute which is at the same time general. The two classifications are distinct, for the basis of classification is different.

SAME—MANDATORY AND DIRECTORY.

97. As to the results of noncompliance with its provisions, a statute may be either mandatory or directory.

98. A mandatory statute is one which renders the acts to which it refers void unless its provisions are complied with.

99. A directory statute is one which lays down certain rules relating to particular acts, which acts may be valid although such rules are not complied with.

It is often difficult for the courts to decide whether a particular statute was intended to be mandatory or merely directory. It is a matter of construction, and all the circumstances which attended the passage of the law are taken into consideration, unless its character can be determined by a study of the words employed. As an illustration, the laws requiring marriage licenses which have been passed in many of the States might be cited. Were these laws mandatory, they would tend towards restricting marriage. But the law favors marriage, and from this the courts argue that these license laws are merely directory, and that a marriage entered into without a license will be valid; the only real force which they have growing out of the provision under which ministers and others who solemnize a marriage between persons who have no license are punished. The marriage itself is valid, though the law be entirely ignored.

SAME—PROSPECTIVE AND RETROSPECTIVE.

100. As to their operation, statutes are prospective or retrospective.

101. A prospective statute is one which applies only to acts which arise after its enactment.

102. A retrospective statute is one which applies to acts which took place or rights which existed before its enactment.

Retrospective laws are seldom passed, and in some jurisdictions are prohibited by constitutional provisions. Ex post facto laws—i. e. such retrospective laws as make acts, innocent when done, crimes, or increase the penalty attached to crimes already committed—are prohibited by the constitution of the United States.[5]

[5] Const. U. S. art. 1, § 9.

CHAPTER VII.

THE AUTHORITIES AND THEIR INTERPRETATION.

103. The Rank of the Various Authorities.
104–109. General Rules for the Interpretation of Laws.
110–119. Rules for the Construction of Statutes.
120–122. The Interpretation of Cases.

THE RANK OF THE VARIOUS AUTHORITIES.

103. The various sources of law in the United States rank in authority as follows:

(a) The constitution of the United States.

(b) The treaties and statutes of the United States.

(c) The constitution of the State.

(d) The statutes of the State.

(e) Local ordinances.

(f) The common law as evidenced by the reports of cases.

(g) The common law as evidenced by usage.

In determining the law applicable to a particular case in controversy before the courts, the judge appeals to the various sources of authority which are mentioned above. If the necessary principle is found in the constitution of the United States, he need look no further, for that document is of supreme authority. But, as we have already seen, the principles of law which are stated in the constitution are few, and of the most general character. Next in rank to the constitution as a source of authority are the treaties and statutes of the federal government. These are of coordinate rank. A later treaty will supersede a prior statute

if contradictory thereto, and a later statute will supersede a prior treaty. No law of the particular States has any force if inconsistent with the laws, treaties, or constitution of the federal government. It is of course to be understood that the federal government can enact only such laws as are within its jurisdiction as established by the federal constitution.

A large majority of the cases which come before the State courts involve only the laws of the particular State. At the basis of these laws is the State constitution, which is fundamental in its character. No statute of the State is of any validity if it is inconsistent with the principles of the constitution. Furthermore, no enactment of a subordinate legislative body, as that of a municipal corporation, is of any validity when it contradicts either a statute or the constitution of the State in which it is situated. The authorities which have thus far been mentioned together make up the written law which is in force in the United States. As we have already seen, the unwritten law is of no force as against any statutory or constitutional principle.

GENERAL RULES FOR THE INTERPRETATION OF LAWS.

104. The following general rules apply to the interpretation of all laws, whether written or unwritten:

105. Words are to be understood in their ordinary popular signification; but technical terms are to be interpreted according to their meaning in the art or science in which they are employed.

106. Words and phrases should be interpreted in the light of the context.

For example, if the same word appears twice in the same law, its meaning in one instance may assist in its proper interpretation in the other.

107. Where a particular rule is in itself of doubtful significance, the subject-matter of the law will usually be found of assistance in determining its meaning.

108. If a rule is capable of two interpretations, one of which is absurd and the other reasonable, it is to be presumed that the latter interpretation is intended.

109. The reason and spirit of a law are always to be considered in its interpretation.[1]

The business of courts is to apply the law to particular states of fact which come before them; but their object is not accomplished, or is only partly accomplished, when they have found a rule which seems to apply to the case in hand. They have still to determine the exact meaning of the law, and hence there arises a necessity for rules of interpretation. These rules have grown up as part of the unwritten law, and are based upon the wisdom and experience of the courts. In addition to the rules which have just been stated as applicable to all laws, various technical rules for the interpretation of statutes are also in vogue, as well as other equally technical rules which govern the interpretation of judicial decisions.

[1] 1 Bl. Comm. p. 59.

RULES FOR THE CONSTRUCTION OF STATUTES.

110. Statutes are to be interpreted in the light of the unwritten law.

For example, if a statute is merely declaratory of the unwritten law, its meaning may be determined by the true meaning of the principles of the unwritten law which it declares, or, if a statute contains a word whose meaning has already been determined in the unwritten law, it is presumed to have the same meaning in the statute.

111. Statutes which apply to persons or things of an inferior rank cannot, by any general words, be extended to those of a superior.

112. Penal statutes are to be strictly construed.

That is, they are to be construed in the interest of the accused person, who is to be given the benefit of any doubts as to their construction.

113. Statutes relating to fraud are to be construed liberally.

114. A saving or condition totally repugnant to the body of the statute is of no effect.

115. A statute has no power to impose limitations upon the authority of future legislatures.

116. A late statute repeals all prior statutes with which it is inconsistent.

117. Under the common law, the repeal of a repealing statute operated to revive the original statute; but in England at this time, and in many of the States, this rule has been abolished.

118. One part of a statute is to be construed in the light of another so that the whole, if possible, may stand.

119. If, when all the rules of interpretation have been applied, no reasonable meaning can be derived from a particular statute, as if it is impossible to be performed, or if in other respects contrary to reason, the statute will be void.[2]

THE INTERPRETATION OF CASES.

120. Only those judicial decisions are regarded as authoritative which are handed down by courts of last resort.

When a controversy arises, and is brought into a court for determination, the first object of the court is to determine what the facts in the case really are; and this duty is usually performed by what is known as a "trial court." The trial court has power to determine provisionally the law applicable to the case, and in many cases this provisional determination of the law is found satisfactory by the parties to the case, and is not appealed from. If, however, there is dissatisfaction with the decision of the trial judge on a point of law, the parties to the case are usually permitted to appeal to a higher court, whose principal business it is to determine such points by a final, authoritative decision. When a court has power to determine finally the legal principles which are to be applied to particular cases, such a court is called a "court of last resort." The decisions on points of law in all other courts, being merely provisional, and liable to reversal or modification if

[2] 1 Bl. Comm. p. 87. See, also, Sedg. St. & Const. Law, p. 225.

an appeal is taken, are not regarded as of binding authority as precedents.

The decisions of the courts of last resort are reported and published in bound form for the use of courts and the legal profession. The report of a case usually contains a brief statement of facts involved, and a statement by one or more of the judges of their decision on the legal point, as well as the reasons upon which such decision is based. At the head of the report there is usually placed a condensed statement of the leading principles for which the case is authority, which statement is called a "syllabus."

121. A particular decision is authority for only those principles of law which are necessary to determine the case before the court. If any other principles are laid down than those necessary to the decision of the case, they are of no weight as authority, and are called "obiter dicta."*

This rule is a fundamental one. The court, in laying down the law for a particular case, has no authority to go outside of its duty, and determine principles which, however appropriate they may be in other cases, have no bearing upon the one in controversy. And, when the court does so exceed its authority, it is plain that such principles are obiter dicta, and cannot be regarded as of any more force than a mere opinion of the judge in his individual, rather than his official, capacity. Yet it is sometimes very difficult to distinguish obiter dicta from the true doctrines of the case. This can best be done by carefully examining the facts, and extracting from them, as nearly as possible, the

* "Obiter dicta" means literally "things incidentally said." Its force in this connection will be apparent.

exact point in issue. If the rule stated by the judge tends directly to decide this issue, it forms part of the doctrine of the case; if not, it is ordinarily obiter dictum.

122. Whenever a court lays down a principle of law inconsistent with that which is laid down by another court of equal authority, there is said to be a conflict of authority. If, however, the same court at a later time lays down a doctrine which is inconsistent with its decision in a previous case, the former decision is said to have been overruled. Whenever a point arises on which there is a conflict of authority, the court is determined in its decision by its own views as to the correct principle, or will decide in favor of that view which is supported by the preponderance of authority.

There are in the United States a large number of courts of last resort. Each State has one of these courts, and the United States government has not only its supreme court, but its circuit courts of appeals, which exercise functions of this character. When we consider, too, that the decisions of the English courts are often taken as authority in this country, it will be readily realized that there is a great opportunity for conflict among those courts which administer common law. These conflicts are sometimes the result of failure on the part of the judges, and of those attorneys who argue the cases, to call attention to all the precedents which might be cited, and sometimes are due to a desire on the part of a certain court to introduce reforms into the legal system.[3]

[3] For a further discussion of the interpretation of cases, see the opening chapters of Wambaugh's Study of Cases.

CHAPTER VIII.

PERSONS AND PERSONAL RIGHTS.

123–125. Legal Rights, Wrongs, and Remedies.
126–128. Rights in Rem and Rights in Personam.
129–131. Persons, Natural and Artificial; Status.
132. The Fundamental Rights in Rem.
133–134. The Right of Personal Security.
135. The Right of Personal Liberty.
136. The Right of Private Property.
137–138. Constitutional Guaranties of the Fundamental Rights.

LEGAL RIGHTS, WRONGS, AND REMEDIES.

123. A legal right is a power, interest, or privilege recognized and protected by the municipal law.

124. A legal wrong is the violation of a legal right.

125. A legal remedy is the method employed by the law to enforce a legal right, or to redress a legal wrong.

All laws of human action recognize the existence of rights. While in the moral law they are often a mere background for principles which govern the conduct of life, yet in reality every violation of that or any other human law is an infringement of some right, however shadowy that right may be. The moral law deals with moral rights; the Divine law has to do with those rights which are supposed to have received Divine approval; the international law deals with the rights of nations in their sovereign capacity; the munic-

ipal law is concerned with those rights which government recognizes and protects. And so inseparably is the idea of rights interwoven with the conception of law itself, that the latter cannot be fully understood without some reference to the former.

A distinction should be drawn between the noun "a right" and the adjective "right." Entirely different ideas are conveyed when we speak of "that which is right," and the "right of a person" to control his property. The former involves an abstract conception of conformity to some fixed standard, while the latter indicates a recognized power to do something, or to control something. Either of these terms may be applied to the law. It may be said that a legal rule is right or wrong, in that it does or does not conform to the ideal of justice, or the rule may be regarded from another point of view, as conferring upon certain persons certain powers. In the present chapter attention will be devoted to the substantive meaning of the term "a right," inasmuch as a discussion of the other form of the conception would bring us into the field of ethical, as distinguished from practical, jurisprudence.

It will readily be seen that the term "a right" is frequently used in the vernacular as meaning a power which one is morally entitled to exercise. But in the municipal law it is used in a technical sense. In that system, we have seen that no legal force is given to moral rules, as such. The moral law is essentially distinct from the municipal law. While there is a large class of rights which are sanctioned by both systems, yet there are many recognized by each which the other does not enforce. What is morally right may be legally wrong, while it is true that the law allows many things to go unpunished which are morally reprehensible. The municipal law applies its sanctions to no rights, however strong may be the popular ap-

proval of them, which are not embodied in the laws of the state. Those rights which form the subject-matter of the muncipal law are called "legal rights," and it is because it enforces these rights that the whole machinery of that law finds its existence justified.

A legal right is therefore a power, interest, or privilege which the law will protect, and the recognition of which it will enforce by means of its sanctions. Whenever a legal right is violated, the law is violated, and it becomes the duty of the state to redress that violation. This is done by the application of what is called a legal remedy. The application of a legal remedy is in many respects analogous to the administration of a medical restorative. When a human being is in a diseased condition, the physician prescribes such a drug as shall tend to bring about the man's restoration to a normal condition. And so it is in theory of the law. When a person's rights are violated, his condition is regarded as abnormal; and the court, in granting him relief, merely endeavors to restore him to a state of legal health. The laws governing the administration of these legal remedies form what is known as the remedial or adjective law, which will be explained in detail later.

RIGHTS IN REM AND RIGHTS IN PERSONAM.

126. Legal rights are divided into two classes: (1) Rights in rem; and (2) rights in personam. Rights in rem are often called "rights of ownership," while rights in personam are sometimes known as "rights of obligation."

127. Rights in rem are those rights which the possessor holds as against the whole community, and which involve a corresponding duty on the

part of the whole community to refrain from disturbing them.

128. Rights in personam are those rights which the possessor may enforce against particular individuals only, and which correspond to obligations on the part of such individuals to act or forbear in regard to the subject-matter of the right.

Every right involves certain acts or forbearances on the part of some person or persons other than the possessor of the right. Thus, if I have a right to the ownership and use of my horse, there is a corresponding duty on the part of all others to abstain from interfering with such ownership and use of it. If a man deprives me of my possession of it, he violates this right which I possess; and the law will use its machinery to enforce the right by punishing the offender, and restoring the horse to me. This particular sort of a right, being enforceable against the community at large, is a right in rem. So the right which one has over his own person, being likewise correlative to a general duty to forbear, is also a right in rem.

Let us suppose, however, that two persons have entered into a contract with each other. Here a different kind of a right exists. Each has a right to require of the other the performance of what that other has promised. Such a right is not enforceable against all the world, but only against the other contracting party. Being available only against a specific person or specific persons, it is a right in personam.

A right in rem is often called a right of ownership. It is correlative to a general duty on the part of all. A right in personam is referred to as a right of obligation, because, instead of this general duty, there is a specific obligation resting on a limited number of definite persons. Such a

right involves a power to require certain persons to act or forbear in a manner different from the rest of the community. It will be plain that a right in personam may grow out of the violation of a right in rem. The moment a right in rem is violated by a specific person, there arises a right in personam against that person; not a right to exact forbearance on the latter's part, but to compel him to compensate the injured person for the violation. The injurer remains, of course, under the duty to observe the general right in rem, as well as the community at large; but he is also under a more definite obligation in personam.

PERSONS, NATURAL AND ARTIFICIAL; STATUS.

129. A person, in the law, is any human being or legal creation capable of possessing legal rights.

130. Persons are classified into natural persons and artificial persons. A natural person is a living human being, of whatever age or sex. An artificial person is a legal entity, existing only as the possessor of legal rights and obligations. The most prominent artificial persons are states and corporations.

131. By the "status of an individual" is meant the legal position of that individual with reference to the rest of the community. It involves rights and duties which are imposed by the law, and which cannot be avoided by the individual's own act or agreement.

The meaning of the term "person," in the law, differs somewhat from its general popular use. As a subject of the law, a person is nothing more or less than an individu-

ality around which legal rights and duties gather. This individuality may be embodied in human form, or it may be merely a legal conception. The law has not always recognized all human beings as persons. Slaves were usually regarded as mere chattels, without any of the ordinary legal rights, and they therefore would not come within the meaning of the term. Since the abolition of slavery, however, it may be said that, in general, all human beings are persons, and they are distinguished from all other persons by the designation "natural persons."

In order that a human being be a person, his actual existence must have begun; that is, he must have life. Life is ordinarily regarded as begun the moment the child is able to stir in his mother's womb. Previous to that, the law does not regard the unborn child as a person. A human being, moreover, ceases to be a person at the moment of physical death.

In the early history of the law, rights were frequently attached to groups of persons, these groups thereby themselves assuming some of the attributes of personality. Many rights were in early times attached to the family as such. But at the present time family rights, as such, are seldom or never recognized, having given place to the individual rights of the members who compose the family.

In modern times, the class of artificial persons has attained great importance. The most prominent example of this class is the state itself. The state is a person because it has rights,—rights which are usually regarded as paramount. There can, of course, be but one state in a particular community; and, as a consequence, the number of such persons is small. The most numerous artificial persons are corporations which are the creatures of the state.

A person being in the law one who is capable of possessing legal rights and duties, his status is sometimes de-

scribed as the sum of those rights and duties of which he is possessed. In the common language of the books, however, it signifies rather a condition in which a person is placed, by virtue of which certain rights and obligations are imposed by the law on him, as a member of a class. For example, one element of the status of a natural person is his citizenship. On account of his citizenship, he has certain rights and duties in common with all other members of the class of citizens. He has those rights so long as he remains a citizen. He cannot give them up without ceasing to be a citizen. Again, when a human being is under the age of twenty-one, many of his rights are different from those which attach to him when he becomes of age. When he arrives at his majority, he is said to change his status, so far as those particular rights are involved. This change cannot be influenced by the will of the person himself, but takes place by operation of law.

There are certain relations between individuals which are commonly referred to as relations of status. Marriage, for example, creates a relation of status between husband and wife. The husband comes under certain liabilities, as that to support his wife, which he cannot avoid, even though the wife agree to release him from them. Relations of status are contrasted with contract relations, the liabilities incident to which may be altered, or even abolished, by an agreement of the parties.

It will readily be seen that the status of a particular person consists of numerous elements. If he is a citizen he comes under the laws, and acquires the rights and liabilities, which attach to the citizen class. As an adult, he has the rights of all those who have attained their majority. A person's status also depends on sex, and sometimes on race; and, in general, whenever one becomes a member of a class upon which are imposed by the law cer-

tain peculiar rights and liabilities, he varies his status, so far as those rights and liabilities are concerned.

THE FUNDAMENTAL RIGHTS IN REM.

132. There are three general rights in rem which are so universally recognized by free governments that they may be regarded as fundamental rights. They are:

(a) The right of personal security.

(b) The right of personal liberty.

(c) The right of private property.

History has devoted many of its most interesting pages to an account of the struggle of peoples for the recognition of these fundamental rights. In England they are attested by a long line of constitutional documents, beginning with Magna Charta (1215), and often forced from arbitrary rulers at the point of the sword. In America they find expression in the constitution of the United States, and in the constitutions of the individual states. And it may be said that their existence is now recognized in the laws and traditions of all western civilized nations.

133. The right of personal security is the right of freedom from injury to life, limbs, body, health, or reputation.

Human life is universally recognized as every man's natural right, unless he has so conducted himself that his existence is a menace to the community, when the state will sometimes deprive him of it. All other rights presuppose this one. Next to the safety of the state itself, the life of man is cherished by all free governments.

134. The limbs are those parts of the human frame which are useful in fight. The body includes all other parts.

The limbs include the arms, legs, eyes, front teeth, and all parts, the deprivation of which would render one less able to defend himself. The distinction between the limbs and the body is not always clear. It would seem that there is no part of the frame, a serious injury to which would not impair the individual's fighting power; but, where the part is such that an injury to it would affect this power only indirectly, it would not be classed as one of the limbs. An injury which involves a loss of limb is called a mayhem.

When a person is threatened with an injury to life, limbs, or body, it is his right to defend himself. When his life or limbs are endangered, he may even go to the extent of taking the life of his assailant, when that is absolutely necessary for his own protection. But he is not justified in killing another when he apprehends an injury to his body only. And in any case, in order to justify any act of self-defense, there must have been reasonable ground to believe that personal violence was intended on the part of the aggressor.

The right of immunity from undue injuries to health is also an element of the right of personal security. Thus, the giving to another of impure or poisoned food is a violation of this right; and, when a person so uses his premises as to engender noxious or otherwise injurious odors, the general health of the neighborhood is endangered, and such use is in violation of the law.

Not only has every individual the right to be exempt from such injuries as affect him physically, but he is also protected from unjust attacks upon his good name. When

such attacks are made in writing, or through a printed newspaper or other periodical, or a printed book, the injury is called a libel. When they are committed by means of spoken words or by actions, it is denominated a slander. And, whether it take the form of libel or of slander, any unjust attack on a person's reputation will be redressed by the courts.

135. The right of personal liberty is the right of an individual to act with freedom, except so far as he is restricted by the law.

The word "liberty," as used by our Revolutionary forefathers, included all of the fundamental rights,—those inalienable rights which are necessary to the pursuit of happiness. It is not infrequently used in this sense in the law. But, when the right of personal liberty is referred to, there is no intention of including the right to life or of property within the term. Writers on morals tell us that every man should have perfect freedom of movement, so far as his actions do not interfere with a like freedom on the part of his fellow men. And this is the spirit of the law. But in this connection, as elsewhere, it is necessary to remember that moral rules are effective in the law only so far as the state has impressed upon them the character of legal rules. Instead, therefore, of the vague principle that one may act so far as he does not interfere with the right of another to do the same, we have the more definite rule that one may act so far as he is not restricted by the law. Any violation of this right to act is a violation of the right of personal liberty, and is called a false imprisonment.

136. The right of private property is the right of an individual to possess and own things unconnected with his person.

The right of private property will be discussed in detail in a subsequent chapter.

CONSTITUTIONAL GUARANTIES OF THE FUNDAMENTAL RIGHTS.

137. In England the fundamental rights in rem are guarantied in the constitution. The principal documents in which they are recognized are the Magna Charta, the Bill of Rights, the Petition of Right, and the Habeas Corpus acts. Taken together, these documents are often said to be the basis of English liberty.

138. In the United States various provisions exist in the federal constitution, the object of which is to guaranty the observance of the fundamental rights. In the constitutions of most of the states there are what are called bills of rights, in which an attempt is made to state systematically the fundamental rights of man.

Magna Charta is often pointed to as the beginning of the development of English liberties. It was forced from King John in 1215, on the plain of Runnymede. It contains 63 articles, and, with few exceptions, each article recognizes some distinct right. Articles 39 and 40 are the most celebrated and the most fundamental. They are as follows:

Art. 39. "No freeman shall be taken or imprisoned or disseized or outlawed or banished or any ways destroyed, nor will we pass upon him, nor will we send upon him unless by the lawful judgment of his peers, or by the law of the land.

Art. 40. "We will sell to no man, we will not deny or delay to any man, either justice or right."

These two articles Mr. Hallam calls the "essential clauses" of the Great Charter, being those which "protect the personal liberty and property of all freemen, by giving security from arbitrary imprisonment and arbitrary spoliation."

The Bill of Rights and the Petition of Right are in a sense supplementary to the Magna Charta,—passed, however, at a much later day. The Habeas Corpus Acts were designed to secure to the people the right of personal liberty. "On these," says Mr. Dicey, "rest an Englishman's security for the enjoyment of his personal freedom." The chief of these acts was passed in the reign of Charles II., and applies particularly to persons arrested on a charge of crime. A later act was passed in the reign of George III., and applies to all other cases of imprisonment. The two acts, taken together, form a guaranty that no person shall be kept in confinement an undue length of time, except by due process of law.

In the United States the most general statement of the fundamental rights is found in the Declaration of Independence. That document says: "We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness; and that to secure these rights governments are instituted among men deriving their just powers from the consent of the governed."

In the constitution of the United States there is no such general statement, and the citizen is left to deduce from various disconnected clauses the charter of his rights. The fourteenth amendment, however, provides that no State shall "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction

the equal protection of the laws." There are also clauses which guarantee freedom of religious belief, of speech, and of the press; the right of the people peaceably to assemble, and the right of petition to the government; the right to bear arms; the right to be secure from unreasonable searches; the right of trial by jury; and various other provisions regulating the conduct of trials for crime. The constitution further provides that the privilege of the writ of habeas corpus shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it; and, as its crowning glory, that "neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction."

In most of the State constitutions there is a more systematic attempt to define the rights of the people than is aimed at in the constitution of the United States; and the provisions designed for that purpose are usually collected together, and called the bill of rights. The danger of encroachment upon these fundamental rights is twofold: (1) That of encroachment by the governmental power; and (2) that of violation by private individuals. We have seen that the United States government has only such powers as are conferred upon it by the federal constitution, either expressly or by necessary implication. It is natural, therefore, that its authors should not regard it as so necessary to provide in that instrument for governmental encroachments upon private rights as it might be in formulating a constitution for a state which has all power of government unless restricted. Both the federal and State constitutions, however, contain ample guaranties against either public or private encroachment upon the fundamental rights of security, liberty, and property.

CHAPTER IX.

PROPERTY.

139–140. Property in General.
141–144. Historical Phases of Property.
145–147. The Feudal System.
148–150. Ownership and Possession.
151–156. Limitations on Ownership.
157–159. Corporeal and Incorporeal Property.
160–163. Real and Personal Property.
164. Fixtures.

PROPERTY IN GENERAL.

139. The subjects of law are either persons or things. A thing may be defined as any portion of matter or creation of the law which does not possess inherent legal rights.

140. The word "property" is used in the law in two senses: First, as synonymous with the word "thing"; and, second, as denoting the ownership of a thing, as distinguished from the mere naked possession.

In seeking the means for securing his highest welfare, man reaches out and takes hold of the objects of the material world. The supremacy of the human race over the lower animals and all inanimate matter is so universally recognized that it is embodied in all philosophies, all religions, and all systems of law. It is, therefore, a fundamental distinction which separates persons and things from each other, —the one including those existences which are possessed of legal rights, i. e. the ruling elements; the other, those

which are merely the objects of personal control. Things, as such, have no legal rights. All rights in them are rights of persons. Not only does the class of things include inanimate objects and animals, but it comprehends also such intangible existences as rights themselves.

To this entire class of objects technically called things, popular usage has given the name "property," and this usage of the term is also common in the law. The same word, "property," is, however, used by legal writers to denote the permanent and stable ownership in a thing, as distinguished from its mere naked possession.

THE HISTORICAL PHASES OF PROPERTY.

141. Property has, at different stages in the development of civilization, been held by men in three distinct ways, corresponding to three different types of social philosophy: anarchy, communism, and individualism.

142. Under the anarchic system, things were regarded as the proper objects of temporary possession only, and not of permanent ownership.

143. Under the communistic or socialistic system, the right of permanent ownership in things was recognized to be in organized groups of persons, but not in individuals.

144. Individualism is the name applied to that social system in which things are regarded as capable of permanent ownership by individual persons. Things so owned or possessed are called collectively private or individual property; and so common has

this form of ownership become in modern times that the right of private property takes its place among the fundamental rights in rem.

The purely anarchic conception of property was confined to the primitive hordes, and exists at the present day only among those tribes which are absolutely savage. Travelers have found absolute anarchy, so far as property is concerned, among the Veddahs, of Ceylon, the Bushmen, of South Africa, and the inhabitants of Tierra del Fuego. It is supposed that communistic property was the next stage in the development towards individualism. Various attempts have been made in modern times to secure the adoption of a communistic system of property, but with little success so far as Christian nations are concerned. The property system of those North American Indian tribes which have not been strongly influenced by their contact with the whites seems, however, to be socialistic in its nature.[2]

Modern civilization is based upon private property. "Just as men," says Montesquieu, "have renounced their natural independence to live under political laws, they have also renounced the natural community of goods to live under civil laws. The former laws gave them liberty, the latter property." It is, therefore, private property only which is to be considered in the study of modern law.[3]

THE FEUDAL SYSTEM.

145. The feudal system was a system of holding property which was in vogue during the Middle Ages, and whose principles have exercised a great influence on the modern law of things.

[2] For a full discussion of the institution of property in its historical phases, see Letourneau's "Property; Its Origin and Development."

[3] Spirit of the Laws, bk. xxvi.

146. Its leading characteristic was that all lands were held directly or indirectly from the sovereign prince by tenure. Tenure signifies the conditions on which a parcel of land is held, and was of various kinds, differing according to the relation which existed between the tenant and his feudal lord.

147. The feudal system was introduced into England by William the Conqueror, in 1066, and continued, though with many modifications, until the passage of the statute 12 Car. II., which enacted that, with certain exceptions, "all sorts of tenures, held of the king or others, be turned into free and common socage."

Before leaving the historical phases of the institution of property, it is necessary to glance for a moment at this system. It grew out of the conditions of society when the barbaric nations of Northern and Eastern Europe poured over the Western countries. The spirit of the times was military. The conquering prince, after having subdued the inhabitants of a particular territory, and wishing to bind his followers to himself so closely that he would be safe in his new position, was accustomed to parcel out his newly-acquired land among his generals, on condition that they would support him in his wars. Those to whom the lands were given directly by the prince were called tenants in capite, or tenants in chief, because they were the chief men of the feudal state.

The tenure by which the tenants in capite originally held was called in England tenure in chivalry, or tenure by knight service. The conditions of their holding were usually that they should aid the prince on the battle field, furnishing, when called upon, a certain number of men; and that they

should render dues of various kinds for the support of the feudal government.

It was customary for each tenant in chief to subdivide his portion, distributing the greater part of it among subtenants, on similar conditions of tenure to those which he himself was under obligation to perform to the sovereign. In this way a vast social structure was erected, with the king or prince at the apex, his tenants in capite directly beneath him, and so on down, through the various classes of subtenants, until we reach the class which actually cultivated the soil. Beneath these there were the serfs or slaves, consisting chiefly of the conquered race or their descendants. This was the typical social organization of the Middle Ages.

Into England this system was introduced by William the Conqueror, at the Norman Conquest, in 1066, A. D. This king acquired by forfeiture the lands of those who had opposed him in his war of conquest. These he distributed among his Norman barons, as feuds. Many of the independent proprietors soon after came forward, surrendered their lands to William, and received them back as his tenants. In this way most of the lands of England became subject to feudal tenure, although, as William did not force the system on his subjects, there were a limited number of parcels which seem never to have been held of a superior. These lands are said to be allodial or independent possessions.

The feudal system existed in full force in England during the reigns of William the Conqueror and his immediate successor; but from the accession of Henry I. it began to lose its strictly military character. Since that time it has been crumbling, until at the present day it exists only in the traces of it which linger in the property laws of those countries which were formerly subject to it.

The essence of tenure by knight service was that the

services to be rendered were uncertain, either in the time when they were to be rendered or in the nature of the acts themselves, which, however, were invariably honorable, or such as it would become a knight to perform. By the side of this tenure there gradually grew up in England what was called tenure by socage, a term derived, as Blackstone states, from the Saxon word "soc," meaning privilege. The privilege involved in this new species of tenure was chiefly that while, in most cases, the services were none the less honorable, they were certain both in time and character, not depending on the caprice of the feudal lord.

There were various other tenures known to the English law, differing in details from the two typical forms which have been described. As civilization progressed, the desire to do away with all forms of strictly military tenure increased, until, in the twelfth year of the reign of Charles II., all those tenures were turned into free and common socage, and the feudal system in England was a thing of the past.

It would require, however, only a very cursory glance at the modern law of property to see that, widely separated as it may be from the law of feuds, it is yet the historical successor of that system. We took our common law from England at a time when the purely feudal tenures had been abolished less than a century. In this country tenure is not recognized; but the terminology used in modern conveyances, as well as many of the rules which are daily administered by our courts, may be traced back, through the English law, to the feudal system of the Middle Ages.[4]

[4] The authorities on the feudal system are numerous. See Hallam's Middle Ages, c. 2, pt. 2.

OWNERSHIP AND POSSESSION.

148. By the ownership or property in a thing is meant the right of absolute control over it, subject only to such limitations as may be imposed by law or by the owner's own voluntary act.

149. Possession is the mere immediate corporeal holding of a thing. It may be rightful, in which case it is usually by permission from the owner, or wrongful, when it is in violation of the owner's rights.

150. The right of possession is always an incident of ownership, unless that right be parted with by the act of the owner or by the operation of some rule of law.

There may, of course, be ownership without possession, or, on the other hand, possession without ownership. This may be illustrated by the case of one who leases his property to another. The rightful possession of the property is in the lessee, although he has no ownership therein. The lessor, on the contrary, retains the ownership of the property, although he has no right to the immediate possession. He may sell it, but such a sale is always subject to the lessee's right.[5]

LIMITATIONS ON OWNERSHIP.

151. The owner of property has the right to control it absolutely, except so far as it is necessary for the welfare of the community that his power

[5] Holl. Jur. pp. 161, 177.

over it be restricted. The chief limitations on his control over his own, as recognized in the American law, are as follows:

152. The owner must so use his property as not to interfere with the rights of others.

153. With certain exceptions, created by statute, all of a man's property may be taken by due process of law for the satisfaction of his just debts.

154. Every owner of property holds it subject to the right of taxation on the part of the government. This right may be defined as that attribute of sovereignty by virtue of which the state may demand and take from its subjects such portions of private property as are necessary for the proper maintenance of government.

155. He also holds it subject to the right of eminent domain; that is, the right which the state, or some natural or artificial person authorized by the state, has to purchase, with or without the owner's consent, any particular portion of private property when such property is necessary for the public use.

156. He holds it, moreover, subject to the police power of the state.[6] By this is meant the power,

[6] It is extremely difficult to assign definite limits to the police power. Bentham, at page 169, pt. 9, of his collected works, describes it as follows: "Police is, in general, a system of precaution, either for the prevention of crimes or of calamities. It is destined to prevent evils and provide benefits. Its business may be distributed into eight distinct branches: (1) Police for the prevention of offenses; (2) police for the prevention of calamities; (3) police for the prevention of endemic diseases; (4) police of charity; (5) police of interior communications; (6) police of public amusements; (7) police for recent intelligence;

inherent in sovereignty, to make reasonable regulations for promoting the general welfare of the public.

The first of these limitations is embodied in the Latin maxim, "Sic utere tuo ut alienum non laedas,"—so use your own as not to injure your neighbor. This is entitled to be regarded as the legal golden rule. It is a maxim upon which are based a great number of legal principles.

Formerly the English law punished debt by allowing the debtor to be imprisoned at the expense of the creditor until the debt was satisfied. This rule was abolished in England in 1838, and has never been in force in the United States. At

(8) police for registration,—for preserving the memory of different facts interesting to the public."

It applies to the regulation of lotteries and a vast variety of subjects. See Stone v. Mississippi, 101 U. S. 818.

The following explanations by two leading courts, will throw light on the subject: "Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient. This is a very different thing from the right of eminent domain,—the right of a government to take and appropriate private property to public use whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power,—the power vested in the legislature by the constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same." Com. v. Alger, 7 Cush. 53, 85. "The power of the state over the property of the citizen * * * is well defined. The state may take his property for public use, upon just compensation being made therefor. It may take a portion of his property by way of taxation for the support of

the present time the creditor has no way of securing satisfaction except out of the debtor's property. Furthermore, statutes in England and this country provide that not all property of the debtor may be taken for this purpose, but that a certain portion of it shall be exempt from seizure. The amount and character of this exemption differ in different jurisdictions.

It is sometimes said that the rights of taxation and eminent domain are the relics of feudal tenure. But they are rather essential incidents to any successful government, whatever may be its form. In fact, these two rights, together with the police power, were known to the laws of ancient Rome centuries before feudalism appeared in Europe.

the government. It may control the use and possession of his property as far as may be necessary for the protection of the rights of others, and to secure to them the equal use and enjoyment of their property. The doctrine that each one must so use his own as not to injure his neighbor—'sic utere tuo ut alienum non laedas'—is the rule by which every member of society must possess and enjoy his property; and all legislation essential to secure this common and equal enjoyment is a legitimate exercise of state authority. Except in cases where property may be destroyed to arrest a conflagration or the ravages of a pestilence, or be taken under the pressure of an immediate or overwhelming necessity to prevent a public calamity, the power of the state over the property of the citizen does not extend beyond such limits. It is true that the legislation which secures to all protection in their rights and the equal use and enjoyment of their property embraces an almost infinite variety of subjects. Whatever affects the peace, good order, morals, and health of the community comes within its scope; and every one must use and enjoy his property subject to the restrictions which such legislation imposes. What is termed the 'police power' of the state, which from the language often used respecting it one would suppose to be an undefined and irresponsible element in government, can only interfere with the conduct of individuals, in their intercourse with each other and in the use of their property, so far as may be required to secure these objects." Munn v. Illinois, 94 U. S. 113, 145.

CORPOREAL AND INCORPOREAL PROPERTY.

157. As to its tangibility, property is divided into corporeal and incorporeal.

158. Corporeal property is that which is visible and tangible.

159. Incorporeal property is that which is invisible and intangible in its nature. It includes rights to corporeal things or to some benefit to be derived therefrom, as distinguished from the things themselves.[7]

The distinction between these two classes of property is a fundamental one. All things are either tangible or intangible,—they may or they may not be seen. It is not necessary to dwell at this point on the nature of corporeal property. We have no difficulty in recognizing it. It is that which we see about us on all sides, and are constantly using, buying, and selling. Examples of it are lands, houses, desks, and trees. A word may be necessary, however, as to the nature of incorporeal things. They are intangible rights, existing only in contemplation of law. It is obvious that this class of property is an incident of a more or less artificial state of civilization. It was difficult for primitive men to deal with things which their hands could not grasp nor their eyes see. Things incorporeal were, however, recognized by the Roman jurists in the time of Justinian, and with the development of the modern commercial spirit, they have become an important factor in civilization.

It has been said that these incorporeal rights relate to

[7] 2 Bl. Comm. 20.

corporeal property. A few examples will make this clear. The ownership of land may be in one person while the right to pass over it is in another. Both the land and the right of way are property; but the former is corporeal, while the latter is incorporeal. Again, suppose property is granted to A. for life, then to go to B. A. has, during his life, the property itself, which is corporeal, while B. has, during that period, merely the right to have the property at A.'s death, —a right which is incorporeal. When A. dies, however, B. assumes actual possession of the land. His incorporeal right has then been satisfied, and thereafter he has the corporeal thing. Further, let us suppose that A. owes B. a debt, which is overdue. B. has the intangible right to payment, which is, of course, incorporeal. When payment is made the incorporeal right ceases. The corporeal property comes into his possession.

REAL AND PERSONAL PROPERTY.

160. In the Roman law, property was divided into movables and immovables. Under the feudal system, movable property was known as "goods and chattels," while immovable property was called "lands, tenements, and hereditaments."

161. In the modern English and American law, immovable property is called "real property," while that which is movable is known as "personal property."

162. Real property is therefore defined by Blackstone as, "such as is permanent, fixed, and immovable, which cannot be carried out of its place; as lands and tenements."

163. Personal property is defined by the same distinguished author as, "goods, money, and all other movables, which may attend the owner's person wherever he thinks proper to go."[8]

The division of property into movable and immovable is equally as fundamental as that into corporeal and incorporeal, and it was certainly recognized much earlier in history. It seems natural to draw a distinction between land, which is incapable of being destroyed or carried away, and cattle, which may be transferred from one place to another or killed. These two things, land and cattle, seem to have been the leading forms of property in primitive times. In process of time, the term "lands" came to include not only the soil, but also rights issuing therefrom, as well as houses and other things permanently annexed thereto.

The term "goods and chattels" corresponds very closely to the "res mobiles," or movable things, of the Roman law. It was a comprehensive term, including all property which was not regarded as permanent and stable in its character.

The terms "lands," "tenements," and "hereditaments" had a legal meaning quite different from their ordinary signification. "Lands" included not only the soil itself, but also the space above it, as well as houses and things permanently annexed, and extended down to the center of the earth. "Tenements" was a term of still wider signification, including all property which might be held of a feudal lord. It included not only lands, but also various incorporeal kinds of property. "Hereditaments" is still more comprehensive, consisting of anything which can be inherited. An heirloom, for example, descended to the heir, and thus, although essentially a movable, was classed with immovables, for only the latter were strictly inheritable.

[8] 2 Bl. Comm. 15.

The terms "real" and "personal," as applied to property, came into use at a later date. It is sometimes said that immovable property was called "real," because when the owner was deprived of the possession he could recover the real thing itself, rather than mere damages, as is usual in the case of personal property. Perhaps the true reason is that, at the time when the term was adopted, this species of property was the only one which was regarded as of a real or substantial kind. Goods and chattels were shifting and unreliable, according to the opinion of that age. They were called "personal," perhaps, because they were capable of attending the owner's person wherever he might go.

One of the most striking sociological movements of modern times is the development of personal property. In feudal times, as we have seen, it was counted as of an importance entirely inferior to land. But the feudal spirit has vanished, and movables now constitute a large percentage of the world's wealth.

FIXTURES.

164. A fixture is an article of personal property physically annexed to land in such a way as to become a part thereof. By such annexation it assumes the nature of real property.

The distinction between real and personal property is in most instances clear. But it often happens that a particular article may be personal under some conditions, but real under others. This occurs usually when a personal thing is attached to realty in such a way as to change its character from movable to immovable.

The term "fixtures" is used by the majority of courts and writers on the subject to designate that personal property

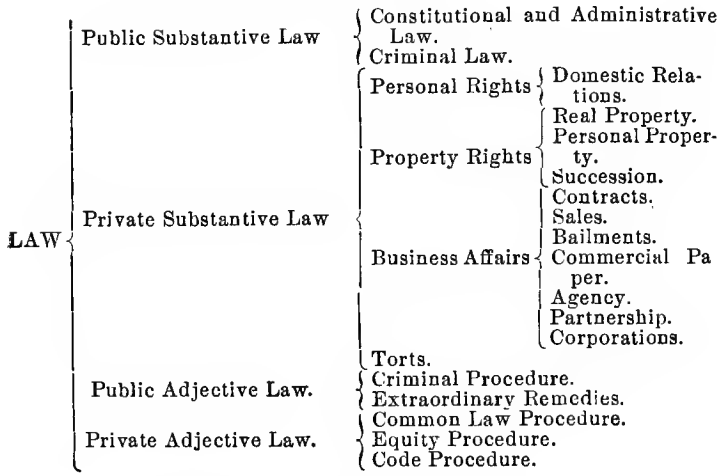
which becomes real by annexation. There are, however, some courts which have used the term in an opposite sense, as meaning that personalty which, although annexed, yet retains its personal character. Those who use the term in this latter sense are, however, in the minority, and the settled meaning of the word is as first stated. This usage seems not only preferred by the authorities, but is more in conformity with the general popular meaning of the term. A fixture is that which is fixed. Its meaning involves a stability which is not consistent with its retaining its movable character.[9]

[9] The authorities supporting this view are numerous. See Cook v. Whiting, 16 Ill. 480; Bartlett v. Wood, 32 Vt. 372. Contra: Washb. Real Prop. 18. Some writers suggest a compromise between the definitions, by drawing a distinction between movable and immovable fixtures, or between real and personal fixtures.

CHAPTER X.

CLASSIFICATION OF THE LAW.

165–166. Substantive and Adjective Law.
167–168. Public and Private Law.
169–172. Subdivisions of Public Substantive Law.
173–176. Subdivisions of Private Substantive Law.
177. Public Adjective Law.
178. Private Adjective Law.



SUBSTANTIVE AND ADJECTIVE LAW.

165. Substantive law is that which creates and defines legal rights.

166. Adjective law is that system of rules which provides for and regulates the enforcement of rights and the redress of wrongs.

When it is sought to reduce the large mass of legal rules to systematic form, and to classify them, various difficulties present themselves. Two different methods have been pur-

sued by legal writers. The first of these, which may be called the scientific method, is adopted by the authors of works on analytical jurisprudence. It is based on the deductive plan. In it terms are used which, while they have an exact scientific meaning, are unknown in many instances to the practical lawyer. The second method, which may be called the popular method, is inductive in its character. It aims to use the topics already universally known in the law, grouping them together, until all the rules which are ordinarily administered find a place in one or the other of several leading groups. This latter method is adopted in the present chapter. There are two general divisions of the law, however, which are recognized under both the scientific and the popular systems of classification. One of these is that into substantive and adjective law; the other, that into public and private law.

It is obvious that there are radical distinctions between those rules which serve to determine what rights are possessed by persons and those which serve merely to provide methods by which those rights may be protected and enforced. The substantive law, on the one hand, is necessarily abstract, while the adjective law is concrete, regulating as it does the machinery of the courts, or, in other words, the method by which the substantive law is applied to particular cases. Without the adjective law, the substantive law would be of no effect, while without the substantive law the adjective law would have no reason for its existence.

PUBLIC AND PRIVATE LAW.

167. Public law is that system of rules governing the rights of the state and regulating the relations of the state with its subjects.

168. Private law includes all rules which regulate the relations of subjects between themselves.

The division of law into public and private originated with the Romans. In the civil law, such was the transcendent importance of the Roman government that public law for a long time overshadowed the rules relating to private affairs. In our own country, however, private law is of paramount importance. While individuals are only occasionally brought into direct relations with their government they are constantly dealing with each other, and the rules regulating such intercourse must necessarily be very numerous.

Public law, as well as private law, may be divided into the substantive and adjective branches. We have, then, public substantive law, private substantive law, public adjective law, and private adjective law. Under these four heads, an attempt will be made to group the ordinary topics with which the lawyer has to deal.

THE PUBLIC SUBSTANTIVE LAW.

169. The public substantive law divides itself naturally into two general topics, one included under the general terms constitutional and administrative law, and the other known as criminal law.

170. Constitutional law, in the United States, is that branch of the legal system which deals with the construction and interpretation of federal or state constitutions.

171. Administrative law is that branch of the legal system which regulates the methods by which the functions of government are performed. It includes many rules of constitutional law, and, in addition to them, various statutory enactments. The unwritten law also furnishes numerous rules of administration.

172. Criminal law is that branch of the legal system which deals with offenses which are so important that the state punishes the offenders in its own name.

Constitutional law, as has been seen, furnishes rules governing the administration of public affairs; but its rules are of a very fundamental kind. From the very nature of constitutions, they cannot furnish rules regulating details. Constitutions, however, are not confined to mere administrative matters, but usually include bills of rights and various other guaranties and regulations. Constitutional and Administrative law overlap each other at certain points. It is convenient, however, to distinguish between them.

From one point of view the criminal law relates to dealings between subject and subject. But, as will be seen later, the law regards a crime as an injury primarily to the state or community. It is the duty of the state to protect its subjects, and it does not wait until its aid is invoked by an injured person, but will in the case of crimes step in and punish the offender on its own responsibility. The law of crimes, therefore, is properly classified as a branch of the public law.

PRIVATE SUBSTANTIVE LAW.

173. Private substantive law may be conveniently classified under four heads:

(a) The law relating to personal rights.

(b) The law relating to property rights.

(c) The law relating to business affairs.

(d) The law of torts or private wrongs.

In grouping the principal topics which are familiar to the practical lawyer under these four general divisions, it is not

to be expected that the divisions will be necessarily exclusive of each other. There are, of course, certain subjects which relate chiefly to the rights of persons as such. There are others which refer almost exclusively to rights in property; as, for example, those containing the rules which determine the rights incident to ownership, and which regulate the transfer of property. Under the general head of the laws relating to business affairs are grouped those topics in which the rights of persons and the rights of property seem to coalesce. For example, when a contract is made it establishes a relation which may be principally of a personal character, or may, on the other hand, involve chiefly rights in property. However, inasmuch as, whether the contract have persons or property as its principal subject-matter, it is governed by the same general principles, it is more convenient to consider the subject of contracts as a member of a distinct class than to subdivide it so as to bring it partly within the laws relating to personal rights and partly within the laws of property.

The subject of torts relates directly to each of the other three general divisions. There may be torts to the person, torts to property, and torts which violate rights growing out of business affairs.

174. The topics which may be properly grouped under the law of personal rights are the laws of husband and wife, parent and child, guardian and ward, and master and servant. The rules governing these four relations are usually discussed under the title "domestic relations."

The term "domestic relations" indicates that the topics included within it are such as relate to the private affairs of life. The law of parent and child grows naturally out of

that of husband and wife, and depends to a certain extent upon it. The law of guardian and ward applies to an artificial relation which is created when the natural relation of parent and child is broken up. It will, perhaps, seem strange at first sight that the relation of master and servant should be classed in the same group as the law applicable to relations growing directly out of the family. But the reason of this will be clear when it is remembered that at the time when the common law was in its formative stage servants were usually domestic servants, forming a part of the ordinary household.

The laws which have thus far been mentioned as relating to personal rights have been such as grow out of relations between different persons. There is, however, a large class of rules which govern rights of an absolute, as distinguished from a relative, character. Thus the rules governing the rights of personal security and personal liberty are clearly to be included under this general topic. But, inasmuch as they are usually discussed in connection with their correlative wrongs, in the present classification they will be considered under the fourth general subdivision,—torts.

175. The law relating to property rights may be conveniently divided into that relating to real property, that relating to personal property, and that relating to succession after death.

In connection with property, whether it be real or personal, there will naturally arise two questions for determination: (1) The rights which the owner may have in his property; and (2) the methods by which those rights may be transferred to others. The first general class of rights is sometimes referred to as rights at rest; the second, as rights in motion.

176. The principal subjects which may properly be grouped under the law relating to business affairs are contracts, sales, bailments, commercial paper, agency, partnership, and corporations.

The subject of contracts is the foundation of commercial law. There is no other subject involved in business transactions which is not based upon it.

The subject of sales involves the transfer of personal property in consideration of money. It is a transfer of the ownership of the property. In the case of bailment, there is a transfer of the possession only, while the ownership remains in the bailor.

The subject of commercial paper involves the discussion of a peculiar species of contract which was developed under the law merchant and adopted into our law from that system.

Attention has already been called to the relations which grow out of the institutions of the family. These are private relations,—relations of status. The relation between principal and agent, called agency, is, on the other hand, a purely business relation, based upon contract.

Partnership is also a contract relation, as distinguished from a relation of status. It is based upon agency, inasmuch as each partner is the agent of the firm in partnership transactions.

Corporations are usually organized for business purposes. The rules governing them are similar to those which regulate natural persons who are engaged in commercial pursuits, except that they are regulated by laws limiting their power of action to the purposes for which they are organized, as well as other rules made necessary by their artificial character.

PUBLIC ADJECTIVE LAW.

177. The public adjective law includes chiefly the two topics of "Criminal Procedure" and "Extraordinary Remedies."

We have seen that the criminal law is a branch of public law, for the reason that the state punishes violations of it in its own name. Criminal procedure is the name applied to the collection of rules regulating the methods by which the punishment of criminals is accomplished. This procedure naturally divides itself into two parts, the first regulating the mode of determining upon the guilt or innocence of a person charged with crime, the second regulating the method of punishment after the accused has been found guilty.

The leading extraordinary legal remedies are the writ of mandamus, the information in the nature of a quo warranto, the writ of prohibition, and the injunction. A writ of mandamus is a writ issued in the name of the sovereign or sovereign body, commanding the performance of some duty on the part of the person to whom the writ is directed. An information in the nature of a quo warranto is in form a criminal proceeding. Its object is to test the right of a corporation or public officer to exercise the functions which are assumed by such corporation or officer. A writ of prohibition is a writ whose purpose it is to test the jurisdiction of a court and prevent such court from exceeding its jurisdiction. These extraordinary remedies were originally the means used by the king to regulate the actions of his subjects, and would not issue merely on petition of the subjects themselves. At the present time, however, this pre-

rogative character has been discarded, and, while the theory of the writs is much the same, they are usually issued at the instance of private citizens as a matter of right.

PRIVATE ADJECTIVE LAW.

178. The private adjective law includes the various rules applicable to the enforcement of the rights of citizens against each other. It regulates the following principal methods of procedure: (1) Common law procedure; (2) equity procedure; (3) code procedure.

The distinction between the common law and equity has already been explained. Under the English system, these two different bodies of law were administered in distinct courts and in different ways. The same distinction in procedure is observed in a large proportion of the States in this country. In some States, however, there have been adopted codes of procedure, in most of which the distinction between legal and equitable forms is abolished. There are, therefore, these three distinct systems which must be considered in a discussion of private adjective law.

There are, however, a number of other peculiar systems, of more or less importance, in vogue in some of the courts. Thus admiralty procedure is somewhat different from any of the leading systems which have been mentioned. Probate procedure is also different in many respects. And various others might be mentioned.

In most of the American States which profess to have adopted the common law procedure, numerous modifications of that system have been made. In some States, as in Michigan, it still retains in the main its English features. In others, as in Maryland, such important changes have been

made that the name of the system has been changed. In that State it is called the "Maryland simplified procedure." Different as our own systems may be, however, from the practice of the English courts, it is yet to that practice that the American lawyer looks for the essential principles of our own.

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PART 2.

THE SUBSTANTIVE LAW.

CHAPTER XI.

CONSTITUTIONAL AND ADMINISTRATIVE LAW.

179. Written and Unwritten Constitutions.
180–182. Illustrations.
183–189. The Construction of Constitutions.
190–191. The Essentials of a Written Constitution.
192–193. Administrative Law.

WRITTEN AND UNWRITTEN CONSTITUTIONS.

179. The constitution of a state may be either written or unwritten. By a written constitution is meant one which has been formally adopted by the sovereign body and reduced to written form. An unwritten constitution is one which has never been thus formally adopted, but consists of those rules which have been habitually observed in the conduct of the government and which have been recognized by the courts as the fundamental law.

The leading characteristic of a written constitution is that it is the result of definite acts of adoption on the part of the sovereign body. Its leading features are usually drawn up and approved at one particular time. The adoption of such a constitution, or a radical change in its provisions, is essentially a revolutionary act. This does not mean that a war must precede such a step. In many cases no violence has been resorted to in order to effect the change. Such an act does not necessarily involve a shifting of the sovereign power. The sovereign body may itself decide to revolutionize the institutions over which it has control. From the very nature of such a constitution, however, its adoption will

invariably be the result of extreme dissatisfaction with the existing order of things, and it is therefore a revolutionary measure.

A purely unwritten constitution is not known to exist at the present time, but there are several leading nations whose constitutions have never been formally adopted in their entirety. The essential feature of an unwritten constitution is that it is a growth, developing in substantially the same way as any principles of the unwritten law. Where such a constitution exists there is usually no important break in the continuity of the national institutions. It is essentially nonrevolutionary.

SAME—ILLUSTRATIONS.

180. The English constitution is the most notable example of an unwritten constitution which now exists. The institutions of England are continuous, without radical revolutionary changes, from Saxon times.

181. The present constitution of Germany, however, is written, having been formally adopted in 1867.

It is interesting to trace the development of the English constitution, noticing the changes which custom, statute, and judicial decision have worked in it during the 13 centuries of its existence. We find the germ of the modern parliament in the Witenagemote, which met as early as 596 A. D. The king, similar in many respects to the present sovereign, existed more than a century earlier. The result of the Norman Conquest was not to undermine or revolutionize the constitution as it had previously existed, for William the Conqueror submitted to its customs when he ascended the

throne in 1066. Since that time various modifications of the constitution have been brought about, sometimes by war, sometimes by peaceful means. But in all the vicissitudes through which it has passed, it has preserved its identity.

On the other hand, the present constitution of Germany is radically different from the constitutions which existed before the formation of the North German Confederation. It was the result of a long struggle for national unity, a struggle which was decided at the Battle of Sadowa, in 1866, when, Austria being defeated, the North German States allied themselves together for the purpose of forming a national government. Existing institutions were overthrown, and the new constitution was established. Nearly four years later the South German States joined the Confederation, and modifications of the constitution became necessary. The name of the State was changed, and it has since been called "The German Empire." While there is an historical relation between the constitution prior to 1867 and that of the present day, legally no such connection exists.[1]

182. In the United States, both the federal constitution and the constitutions of the individual states are written constitutions.

This could hardly be otherwise. The prevailing spirit at the time of the American Revolution demanded a radical change in the form of government. Such a change could not, of course, be effected without the careful preparation of a new plan for the state, and this plan was naturally reduced to written form. It is also difficult to see how any definite division of the powers of government between the state and

[1] For a detailed discussion of the characteristics of the English and German constitutions, see Anson's Law and Custom of the Constitution; Woodrow Wilson's The State.

federal authorities could have been made without a written instrument. The constitutions of the 13 original States were also written, and the States admitted into the Union since the adoption of the federal constitution have followed their example. As a result, constitutional law, in this country, is practically limited to a construction of the various clauses of these written constitutions.

THE CONSTRUCTION OF CONSTITUTIONS.

183. The rules governing the construction of laws in general and those relating particularly to the interpretation of statutes, which have been previously discussed, apply also to the construction of constitutions. It will be well, however, to note particularly the special application of several of these rules when constitutions are concerned.

184. The highest court of last resort in a particular jurisdiction is the final interpreter of the constitution governing that jurisdiction.

The interpretation of constitutions, as well as of other laws, is essentially a judicial function. In the construction of the federal constitution, the supreme court of the United States is the final authority. The highest court of last resort in a particular State has the ultimate right to interpret the constitution of that State. It often happens, however, that the question arises in a State court as to whether a State statute is in violation of a provision of the federal constitution. In such cases, it is the rule that if the decision of the State court is in favor of the validity of the statute, the case may be removed to the supreme court of the United States for a decision on the constitutional question;

but if the decision is against its validity, the construction of the state court will be final.[2]

185. The interpretation of a clause of the constitution becomes necessary when, in an actual case, it is alleged that a particular statute is contrary to that clause.

The federal courts, as well as those of most of the States, will not consider the question of the constitutionality of laws unless cases come before them where a decision on that point is necessary in order to determine the rights of the parties. These tribunals were not established merely for the purpose of satisfying idle curiosity, nor to lay down general laws. This would be an encroachment upon legislative power. The primary function of the judiciary is to decide actual controversies, and it is only when a question of constitutional construction arises as an incident to such a controversy that it will be considered by the courts.

186. A statute will be presumed to be constitutional until the contrary is shown.

187. If part of the statute only is adjudged unconstitutional, and this part is capable of being separated from the remainder of the statute, such remainder will not be rendered invalid, unless the two are so mutually connected that the valid part, standing alone, would not express the true intention of the legislature.

Thus, in a leading case, an Illinois statute provided: "If any person shall harbor or secrete any negro, mulatto, or

[2] Rev. St. 1875, § 709. See, also, Cohens v. Virginia, 6 Wheat. 264; Martin v. Hunter's Lessee, 1 Wheat. 304.

person of color, the same being a slave or servant owing service or labor to any other persons, whether they reside in this State or in any other State, or territory, or district, within the limits and under the jurisdiction of the United States, or shall in any wise hinder or prevent the lawful owner or owners of such slaves or servants from retaking them in a lawful manner, every person so offending shall be deemed guilty of a misdemeanor." [3] The latter part of the section was held void, but the validity of the first part was upheld.

188. The construction of constitutions is governed by the doctrine of stare decisis.

That is, if a certain interpretation has been put upon a clause at one time, such interpretation should not be departed from except for reasons of the greatest weight.

189. If a statute be declared unconstitutional, it is made void from the beginning.

Therefore any rights which may have been acquired under it are of no validity.[4]

[3] Willard v. People, 5 Ill. 470.

[4] For a full discussion of the general principles of constitutional construction, see Cooley, Const. Lim. cc. 4, 7; Story, Const. cc. 4, 5; Black, Const. Law, c. 4.

THE ESSENTIALS OF A WRITTEN CONSTITUTION.

190. All American constitutions consist of two elements:

(a) The outline of the form and functions of the different branches of government, and

(b) Guaranties against governmental encroachment upon the rights of individuals.

190a. When these two elements are easily distinguishable from each other, the latter is usually called "The Bill of Rights."

191. Each constitution contains provisions for its own amendment.

It is the characteristic of all written laws, and especially of constitutions, that they are not easily changed. While the common law is ever developing and taking on new forms, statutes are, in the absence of express amendments, as inflexible as the language in which they are written. And so a written constitution, once adopted, cannot be molded to meet new conditions. If change is desired, formal amendment is necessary. Public policy demands that provision should be made for such amendment; for it is not reasonable to expect that the fundamental laws of to day will forever be appropriate. The power of amendment is the safety valve of the written laws, whose function it is to avert revolution.

It is therefore provided in the federal constitution that: "The congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified

by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the senate." [5]

By virtue of this provision 15 amendments have been made to the federal constitution. The first 10 were enacted because of the jealousy of the central government felt on the part of many of the States. They form a bill of rights, the first nine being intended to prevent Federal encroachments upon the liberties of the people, the tenth reserving to the States all powers not delegated to the general government, nor prohibited by the constitution to the States. These were adopted in 1789. The eleventh amendment was proposed in 1798; the twelfth, in 1803. The thirteenth, fourteenth, and fifteenth were adopted at the close of the Civil War, and were ratified in 1865, 1868, and 1870, respectively.

[5] Const. U. S. art. 5.

ADMINISTRATIVE LAW.

192. Administrative law includes all principles, whether constitutional, statutory, or unwritten, which regulate the performance of the functions of government by its officers.

193. It naturally divides itself into:

(a) Rules relating to the executive department;

(b) Rules relating to the legislative department; and

(c) Rules relating to the judiciary.

In England, the two topics of constitutional and administrative law are not very plainly distinguished from each other. In this country, however, while they encroach upon each other's limits to a certain extent, they are essentially distinct; one being based entirely upon the written document which has been adopted as the fundamental law, the other including all rules, even though they may be found in the constitution, which govern the administration of public affairs.

CHAPTER XII.

CRIMINAL LAW.

194–195. Nature of Crime and the Criminal Law.
196. Criminal Incapacity.
197–200. Classification of Crimes.
201. Common-Law Felonies.
202. Modes of Punishment.

NATURE OF CRIME AND THE CRIMINAL LAW.

194. A crime is an act or omission so far contrary to public policy that the person guilty thereof is punished for it in the name of the sovereign body.[1]

195. In most of the American States, the criminal law is made up partly of common-law principles and is partly embodied in statutes.

We have seen that towards many wrongful acts the government of the state assumes an attitude of indifference, and

[1] Among other prominent definitions of a crime may be mentioned:

Blackstone: "An act committed or omitted in violation of the public law either forbidding or commanding it." 4 Bl. Comm. 5.

Bishop: "Any wrong which the government deems injurious to the public at large, and punishes through a judicial proceeding in its own name." 1 Bish. Cr. Law, § 32.

Austin: "An offense which is pursued by the sovereign or by the subordinates of the sovereign." Aust. Jur. § 17.

James Wilson: "A crime is an injury so atrocious in its nature, or so dangerous in its example, that, besides the loss it occasions to the individual who suffers by it, it affects, in its immediate operation or in its consequences, the interest, the peace, the dignity, or the security of the public." 3 Wils. Works, p. 4.

Wharton: "A crime is an act made punishable by law." 1 Whart. Cr. Law, § 14.

will notice them only at the suit of a person who feels himself injured by them. These acts are of such a nature that they are supposed to affect private persons only. But all wrongs of a more atrocious character are supposed to be injurious to the community at large as well as to the individual who receives the immediate injury. The community as a whole are interested in having such actions suppressed. These wrongs the state forbids and undertakes to prevent by the punishment in its own name of those who commit them. It is to this class of actions that the term "crime" is applied.

Crimes and torts bear a close resemblance to each other, and it is therefore necessary to note carefully the distinction between them. This has been stated in various ways. Some writers emphasize the fact that one is a public wrong, while the other is a mere private wrong. Others lay stress upon the degree of atrocity in the act itself; that which is least atrocious being a tort, and that which is more so a crime. These statements are both true in a general sense, but a more practical distinction is found in the respective modes of redress. Whenever the act may be the subject of a private suit for damages, it is a tort. If the act is such that the state will prosecute the offender on its own responsibility and in its own name, it is a crime. There are some acts which may be made the subject-matter of a private suit, and which will also be punished by the state. For example, if A. knocks B. down, the act is called technically an "assault and battery." A. is liable to B. in a civil suit for damages, but he may also be arrested and punished criminally. The act is therefore both a tort and a crime.

Although in most of the American States both the common law and statutes go to make up the criminal law, in a few States it has been decided, either by statute or by judicial decision, that the common law of crimes is not a part of the

criminal law of those States, but that their criminal law is to be taken only from statutes in which the entire system is supposed to be embodied.[2] It is probable, however, that the principles of the common law are resorted to even in those States in the construction of statutory provisions.

CRIMINAL INCAPACITY.

196. A crime consists of two elements, a criminal act and a criminal intent. Consequently, though a person may be guilty of an act which would ordinarily be criminal, yet if he be without criminal intent he will not be held responsible for it.

The absence of criminal intent is usually due either to incapacity on the part of the person committing the criminal act to entertain such an intent, or it is the result of a condition of affairs which precludes the person from exercising it.

Criminal incapacity is usually the result of (1) infancy, (2) insanity, or (3) coverture. When the act is done under the influence of physical necessity, compulsion, or mistake of fact, or is a mere accident, inasmuch as criminal intent does not exist in fact, the act cannot be regarded as criminal.

Infancy.

At the common law, and in most of the American States, a person under the age of 7 years cannot commit a crime, because he is regarded as incapable of entertaining a criminal intent. If he is between the ages of 7 and 14, the question of his incapacity is one to be determined in the light of the circumstances of the particular case. Some children attain

[2] This is true in Ohio, and the doctrine is partially recognized, at least, in Indiana, Florida, Missouri, Georgia, Michigan, Oregon, and Montana.

capacity earlier than others. When he has reached the age of 14, he is always presumed to be capable of criminal intent, and consequently able to commit crime.

Insanity.

An insane person is held to be incapable of entertaining criminal intent, and is therefore incapable of committing crime. This rule applies only to persons who are insane at the time of the commission of the criminal act. Many insane persons have intervals during which they are in full possession of their reason; and if during one of these lucid intervals such a person commits a criminal act, he will not be excused from punishment for it by the fact that his normal condition is one of insanity. On the other hand, a person ordinarily sane may be suffering under such a temporary aberration of mind as to render him to all intents and purposes insane, and consequently he would be exempt from criminal liability. It is the mental condition of the person at the time of the commission of the act which determines his responsibility.[3]

Coverture.

A married woman is excused from punishment for many crimes if the criminal act is committed in her husband's presence. But this rule does not apply in case of the commission of the more heinous offenses, as murder, treason, etc.

The ground of this rule is that, as the wife owes to the husband the duty of obedience, she is in such cases presumed to be acting under his instructions or compulsion in the commission of the criminal act.

[3] Drunkenness does not as a rule excuse the perpetrator of a criminal act from responsibility. But when a person is accused of a crime of which a specific criminal intent is a necessary element,—as "assault with intent to kill,"—if he was so drunk at the time the act was committed as to be utterly incapable of such an intent, he cannot be convicted of that offense.

Accident, Necessity, Compulsion, etc.

Exemptions from liability for the commission of acts done accidentally, or by force of necessity or compulsion, are also based upon the fact of the absence of criminal intent. The term "accident" itself denotes an act which is not intentional. Necessity indicates that there is no wish or intention to perform the act, and is not inconsistent with an earnest desire not to do it. The same is true of compulsion.

Based upon a somewhat different foundation, however, is the exemption from liability for doing an act which, although under other circumstances it would be criminal, it was the person's legal duty to perform; as, for example, the hanging of a murderer in execution of the sentence of a court. The real reason of the exemption here is simply that what the law directs a person to do it will not punish him for doing. Some writers are accustomed to refer to this last ground of exemption as "legal necessity."

CLASSIFICATION OF CRIMES.

197. Crimes are usually classified, according to their enormity in the eye of the law, into treason, felonies, and misdemeanors.

198. Treason against the United States is defined in the federal constitution as consisting "only in levying war against them, or in adhering to their enemies, giving them aid and comfort."[4] The same definition is regarded as marking the limits of the crime of treason against the individual states.

199. Under the term "felony" are included all crimes, exclusive of treason, which under the old

[4] Const. U. S. art. 3, § 3.

English law were punishable by death or forfeiture of the criminal's estate. In many of the United States, felony is defined by statute as including all crimes which are punishable by death or imprisonment in the state prison.

200. Misdemeanors include all crimes less than felonies.

Treason forms a class of its own, because from the legal point of view it is the greatest of all crimes. It is regarded as such a fundamental attack upon the order of society that no other crime is entitled to be classed with it. It is an attempt to undermine the very existence of the state; and although the law looks upon all crimes as serious offenses, in the punishment of which the state has a positive interest, it regards the existence of the state itself as the one condition upon which all law and order depend, and any attack upon it as a crime of such enormity that all others pale before it.

The term "felony" at the common law covered only a limited number of crimes. But in the States of this country, many crimes which were not felonies at common law are made so by statute, being either expressly declared to be so, or such a penalty being attached to them as to bring them within the meaning of the term. To distinguish these new felonies from those which existed under the common law, they are called "statute felonies."

COMMON-LAW FELONIES.

201. The leading common-law felonies were murder, manslaughter, rape, arson, larceny, robbery, and burglary.

(a) **Murder is the unlawful killing of another with malice aforethought.**

Next to its own existence, the state regards the punishment of attacks upon human life as its highest duty. In order that such attacks, when successful, may constitute murder, they must be unlawful, and they must be committed with malice aforethought; that is, with criminal intent.

(b) Manslaughter is the unlawful killing of another without malice aforethought.

As an example of the distinction between the two crimes, let us suppose that A. is the engineer on a railway train. While passing through a certain city he runs his train at the rate of 12 miles an hour, when the laws or ordinances of that city are such that he should run at a rate of only 6 miles an hour. At a certain crossing he negligently and carelessly runs over a man who is crossing the track. This is clearly a case of manslaughter; for, although, perhaps, grossly negligent, A. had no actual intention or malice aforethought to kill the man. But, let us suppose that A. sees the man, and recognizes him as an enemy, and that he increases his speed, with the intention of reaching the man and knocking him down, and the man is killed. The existence of the intent to kill would make the crime murder.

(c) Rape is the unlawful carnal knowledge of a woman without her consent.

(d) Arson is the unlawful burning of the dwelling house of another person.

It should be noted that the house must be that in which some other person abides or has a right to abide. If it be the house in which the person himself lives, his burning it would not constitute arson.

(e) Burglary is the breaking and entering of the dwelling house of another, during the night, with intent to commit a felony.

It is not necessary that the intention of the person committing the crime should be to steal, though such seems to be the popular opinion. The breaking and entering may be for the purpose of committing murder, rape, arson, theft, or any other common-law or statutory felony.

(f) Larceny is the unlawful taking and carrying away of the personal property of another, with intent to deprive that other permanently of his rights therein.

Larceny is one of many crimes of which a particular intent is a necessary element; and the intent necessary to this crime is to convert the property to the person's own use, thereby permanently depriving the owner of its benefit. Consequently, if the intent is to take it only for a specific purpose, and return it without loss when that purpose is accomplished, the crime of larceny is not committed.

(g) Robbery is the unlawful taking of personal property from the person of the owner, or in his presence, by means of actual or threatened violence.

Robbery differs from larceny only in the fact that the taking is from the person of the owner or in his presence, and that it is accomplished by means of force or threats of force. The taking must be of personal property, and the intent must be to deprive the other of his permanent rights therein.

It has been thought fit to mention only the most common and important crimes, in order that a fair idea may be had of the nature of crimes in general. The statute felonies and misdemeanors are so numerous that their study must be deferred until the subject of criminal law is taken up specifically.

MODES OF PUNISHMENT.

202. There are three methods which modern governments employ in the punishment of criminals, called, respectively, "capital punishment," "imprisonment," and "fines."

The whole efficacy of the criminal law depends upon the punishment of persons who are convicted of crime. The object of this punishment is not, in theory at least, vengeance, but in some cases is designed to work a reform in the criminal, and in others, where such reform is regarded as impossible, to protect the community from further criminal acts by the same person and to serve as a warning to others. Various forms of punishment are resorted to, the most common of which are:

Capital Punishment.

Capital punishment is punishment by death, and is in modern times applied only to those guilty of treason and murder. The usual mode of executing the criminal is to hang him by the neck until dead. In New York, however, the authorities have adopted the method of electrocution, or killing by an electric shock. In a number of States capital punishment has been abolished, so that life imprisonment is the most severe punishment which can be resorted to.

Imprisonment.

In every State are maintained various prisons, ranging in importance from the county jails to the state prisons, in which convicted criminals are confined for terms varying according to the character of the offenses of which they are respectively guilty. Imprisonment is the usual punishment for all of the more important crimes, excepting treason and murder.

Fines.

Fines are resorted to only in case of the more petty offenses. They seem to be a remnant of the old custom of forfeiture as a punishment for crime, which was characteristic of the felony. Frequently a criminal is given an option of paying a certain fine or being imprisoned, and sometimes both penalties are applied for the same offense.

CHAPTER XIII.

THE LAW OF DOMESTIC RELATIONS.

203. Marriage in General.
204. Impediments.
205. The Contract of Marriage.
206–207. The Marriage Relation and its Incidents.
208. The Married Women's Acts.
209–210. The Termination of the Relation.
211–213. Parent and Child—Legitimacy.
214–215. The Disability of Infants.
216–217. The Duties of Parents.
218. The Rights of Parents.
219. Emancipation.
220. Guardian and Ward.
221–223. Rights and Duties of Guardians.
224. The Termination of the Relation.
225–226. Master and Servant.
227. The Termination of the Relation.

MARRIAGE IN GENERAL.

203. Marriage is the voluntary union of one man and one woman, to continue during life or until set aside by judicial decree. This relation is the basis of the domestic relations.

In the earliest stages of civilization it is quite certain that the union of the two sexes was entirely promiscuous. Marriage even in the most rudimentary form did not exist. At the time, however, of the earliest authentic record there seems to have been recognized a more or less definite relation, although it does not seem to have been governed by any very well-established principles. Numerous instances are on record of marriage by capture, which seems to be still the prevailing form in parts of Australia and in various islands

of the South Pacific. This seems to have been resorted to even in the early history of Rome, for it is said that Romulus, the founder of the Eternal City, captured the Latin and Sabine women and made them the consorts of his Roman youths.

The two leading types of marriage among the less civilized races were polyandry and polygamy. The former is found to-day in practice among some of the native tribes of India. The latter is in vogue at present among many nations who are far advanced in civilization.

The women of Malabar, in India, usually have five or six husbands. In one tribe it is said to be law that when a girl marries a man she also becomes the wife of all the younger brothers of the husband, while he in turn becomes the husband of all her younger sisters.

Polygamy, as is well known, is practiced among the Turks and other Eastern peoples. Monogamy, which is the only form of marriage now recognized by Christian governments, took centuries for its development. In the primitive ages, woman was a slave. Promiscuity, capture, polygamy, were the indications of her degradation. With the establishment of a monogamous marriage her rise began. She has been growing ever since from slavehood to womanhood, and the end is not yet.

In the modern law books marriage is often referred to as a mere civil contract; but the truth of this statement depends upon whether we are considering the relation existing between husband and wife or the means by which that relation is entered upon. Although the relation is established by means of a contract, it is not simply a contract relation, but a relation of status. Once entered into, obligations are imposed by law, of which neither party can relieve himself unless the relation is terminated. If it were simply a contract relation, the parties could by their own agreement set

it aside, whereas the termination of the marriage relation can take place only by an action on the part of the agencies of government, or by the death of one of the parties.

IMPEDIMENTS.

204. Under the American law only those persons may enter into the marriage relation who are free from certain disqualifications. The chief of these disqualifications are:

(a) Relationship within the prohibited degrees;
(b) The existence of a prior marriage not yet dissolved;
(c) The lack of sufficient age;
(d) The lack of sufficient mental capacity; and
(e) The lack of sufficient physical capacity.

These disqualifications can be considered here only in a very brief manner. The relationship referred to may be either that of consanguinity, or blood relationship, or affinity, which signifies relationship by marriage. Further, consanguinity may be either lineal (that is, such as exists between parent, child, grandparent, etc.) or collateral (that which exists between cousins, brother and sister, and other more distant relations). It is a general rule that persons lineally related to each other cannot enter into a valid marriage. Persons related by collateral consanguinity may not, as a general rule, marry, if their relationship is within the third degree according to the civil-law method of computation. This plan of estimating was to commence at the person furthest removed from the common ancestor, reckoning up to the common ancestor, and then down to the other person, counting one degree for each person met in the ascent and descent. Thus, let us suppose the case of first

cousins: The common ancestor would be their grandfather. From him each cousin is two degrees removed. Hence the cousins themselves are related to each other in the fourth degree. In most of the States of this country, the statute, in dealing with this subject, mentions particularly each relationship which results in a disqualification.

From the fact that our law recognizes only monogamous marriages, it naturally follows that if there is a marriage already in existence to which either of two persons is a party, those two persons cannot enter into a valid union until the former marriage is legally set aside.

The contract by which the marriage relation is entered into differs from other contracts in another important respect. Usually a valid contract cannot be formed unless the parties thereto have arrived at the age of majority, which, in most States, is 21 years. But a valid contract of marriage may be made much earlier. Under the common law, the age of consent for this purpose was 14 in males, and 12 in females. In the States of this country the age of consent varies, being regulated by local statutes. In some States it is 21 in males, and 18 in females. In others, as in Michigan, it is 18 in males, and 16 in females.

The want of mental capacity is also an impediment to marriage. This is naturally true, from the fact that the basis of marriage is the assent of the parties; that is, the union must be a voluntary one. Where either party is insane at the time the marriage contract is entered into, this assent is impossible. But if, although the ordinary condition of the party is that of insanity, the marriage is entered into during a lucid interval, when he is able to give his assent intelligently, it is perfectly valid. On the other hand, if the person is ordinarily sane, but enters into the contract while temporarily insane, the marriage is invalid. Furthermore, if either of the parties was at the time so drunk as to

be incapable of giving an intelligent assent, the marriage is also invalid.

The physical incapacity which will invalidate a marriage is called impotency. It is the irremediable inability to perform sexual intercourse. The general health of the person will have no effect, unless it takes the form of impotency. This incapacity must exist at the time of the marriage in order to invalidate it.

THE CONTRACT OF MARRIAGE.

205. By the contract of marriage is meant the agreement by which the marriage relation is entered upon. It should be distinguished carefully from the contract to marry at some future time. The former results immediately in the marriage relation. The latter is merely an executory agreement, from which no modifications of status result.

As a usual preliminary to marriage there is an agreement or promise to marry, known popularly as the "engagement" of the parties. This preliminary contract is quite different from the contract of marriage, both in the rules regulating the capacity of the parties who enter upon it, and in its results. In order that a person may make a valid promise to marry at a future time, he must, in this country, be 21 years of age. It is, in this and in all other respects, subject to the general law of contracts, which will be explained in a subsequent chapter. We have seen, however, that in order to enter upon a valid contract of marriage it was only necessary that the parties have arrived at the age of consent, which is usually much less than 21.

In the results these two contracts also differ widely. The contract of marriage results at once in the marriage rela-

tion, with all its varying responsibilities. The contract to marry results in no such relation, but in obligations similar to those arising in ordinary cases of contract. If the promise of either party is not fulfilled, the injured person may recover damages for the breach in an action at law.

At the common law no particular ceremony or formal solemnization was necessary in order to make a valid marriage. The typical way of contracting a marriage was known as that "per verba de praesenti," or by words of present promise. By this was meant an agreement between the two parties to take each other as husband and wife thenceforth. A formal marriage ceremony is prescribed by statute in most States, as well as in England. But it is usually held that these statutes are merely directory, and that a common-law marriage will still be valid. It is of course policy for the parties to solemnize their marriage in the form prescribed by statute, but it is not legally necessary.

THE MARRIAGE RELATION AND ITS INCIDENTS.

206. At the common law the result of the marriage was that the legal existence of the wife became merged into that of the husband; and many of the incidents of this theoretical unity still exist. In general, it may be said that the husband assumed control over the wife and her property in such a way as to leave her in a position little better than that of a slave of the higher order.

207. At the present time, most of the disabilities imposed upon the wife by virtue of her relation to her husband have been removed.

By virtue of his position as the head of the family, the husband still controls, to a limited extent, the actions of his

wife. The latter is bound to accompany him whenever he changes his domicile, and she owes to him the duty of reasonable obedience. He has, however, no right to chastise her. He is entitled to his wife's services at common law and in most of the States of this country. In return for the performance of these duties on the part of the wife, the husband is bound to support and protect the wife. If he fails to provide her with the necessaries of life, she may purchase them in his name, and he will be compelled to pay for them.

At the common law, all personal property of which she was possessed at the time of the marriage, or which was reduced to her possession during coverture, became his absolutely. He was also entitled to the rents and profits of all her real property so long as the coverture continued. If as a result of the marriage issue was born, he continued to hold her real property during his life, by virtue of what was called the "curtesy" of England, even though she died before himself. If, however, the husband died before the death of the wife, the latter was entitled to what was called her "dower." This consisted of the right to use during her life one-third of all the real property of which he became seised or possessed at any time during coverture. As a further result of the merger of her existence into that of her husband, the wife was, at common law, absolutely incapable of entering into a valid contract.

THE MARRIED WOMEN'S ACTS.

208. About the middle of the present century, most of the States of the Union passed statutes whose object it was to release married women, to a greater or less degree, from their common-law disabilities. These statutes are generally referred to as the married women's acts.

The general result of these statutes is to give to the wife power to hold both real and personal property, free from the control of her husband. In most of the States which have passed acts of this nature the wife is also given power to make contracts with reference to her separate property. In a few States she is given unlimited power to contract.

THE TERMINATION OF THE RELATION.

209. The marriage relation may be brought to an end either by the death of one of the parties or by divorce.

210. Divorce is the legal severance of the marriage tie before the death of either of the parties. Divorces are usually granted, at the present time, by courts of equity.

Two kinds of divorce are generally recognized, both in England and in this country. The first of these is known as a divorce "a vinculo matrimonii," or a divorce from the bonds of matrimony. It is also commonly referred to as an absolute divorce, because it is a complete severance of the marriage relation. In addition to this complete separation, there is the divorce "a mensa et thoro," or the divorce from bed and board. The effect of this is not to put an end to the marriage relation itself, but rather to do away with the principal obligations incident thereto. It is also known as a judicial separation, because such a divorce provides that the parties shall no longer cohabit.

The grounds which will justify the court in granting a divorce are usually statutory. In the State of South Carolina divorces are not granted for any cause. In the State of New York they are granted in cases of adultery, but for no other reason. The other States are much more liberal, recogniz-

ing various kinds of misconduct as proper grounds. In most of the States extreme cruelty, adultery, desertion for a certain prescribed time, and habitual drunkenness are considered sufficient.

PARENT AND CHILD—LEGITIMACY.

211. As to their relations to their parents, children are either legitimate or illegitimate.

212. A legitimate child is one who is born in lawful wedlock or within a competent time afterwards, and is not the result of adulterous intercourse.

213. An illegitimate child is one who is not born in lawful wedlock or within a competent time afterwards, or who is the offspring of an act of adultery.

The relation of parent and child springs naturally from that of husband and wife. The mutual rights and duties of the parties to this relation depend largely upon whether the child is legitimate or illegitimate. There is, however, a legal presumption to the effect that a child is legitimate, until the contrary is shown. Furthermore, a child who is originally illegitimate may, according to the laws of most civilized countries, be made legitimate either by a subsequent marriage of the parents or by virtue of an acknowledgment of the child's legitimacy by the parent.

THE DISABILITIES OF INFANTS.

214. An infant is one who has not yet reached the age of majority. This age, in the United States and in England, is fixed at 21 years.

215. Before reaching the age of majority infants are under the following disabilities:

(a) As has been stated, an infant is incapable of entering into a valid marriage until he has arrived at the age of consent, which age varies in different states.

(b) As a general rule, an infant under 7 years of age is incapable of committing a crime. Between the ages of 7 and 14 he is presumed to be incapable of crime, but this presumption may be overthrown by suitable evidence. At the age of 14 he assumes full responsibility for his criminal acts.

(c) By statute, in most States, as well as in England, it is provided that no person may make a valid will until he arrives at the age of 21 years.

(d) An infant cannot bind himself by a contract, except for necessaries. Any contracts which he may make before he arrives at the age of majority, with the exception stated, are voidable at his option.

In imposing these disabilities upon infants the object of the law is not to restrict them, but to protect them from imposition; for it is a maxim that infants are favorites in the law. Thus, it is the theory of the law that the general statutes relating to the descent and distribution of property will dispose of that property more justly than the infant himself could do. And so, in case of contracts, the same tendency to protect the infant from the results of the exercise of a judgment supposed to be immature may be seen.

Upon arriving at the age of majority, the infant has the option of ratifying or disaffirming the contracts which he has previously made.

THE DUTIES OF PARENTS.

216. The duties which parents owe to their legitimate children are two: protection and maintenance. The parent, in this country, is usually relieved of the duty of educating his child, such education being provided for by the state.

217. Towards an illegitimate child both parents owe the legal duty of maintenance, so far as to keep it from becoming a public burden.

The duty of protection applies more particularly to the father. In performing this duty, the father may lawfully do anything that he might do in his own defense. The duty of maintenance is based upon social necessity. The human child, without the care and nourishment which the parents alone may properly give, is the most helpless of beings. Under the English law, if a parent runs away and leaves his children, the authorities may summarily seize upon his property and dispose of it towards their relief. In this country, the duty of maintenance is recognized; the parent being obliged to support his children, whether they be legitimate or illegitimate, only so far as to keep them from becoming a burden on the public. In England, the duty of education was formerly recognized as an important one, but in this country the establishment of the public school system has shifted all moral and legal responsibility for the education of the young upon the state.

THE RIGHTS OF PARENTS.

218. The rights of parents over their children are three: custody, obedience, and service. In support of these rights, the common law gives the parent authority to moderately chastise the child when necessary.

In order to enable the father to properly care for his legitimate children, he is allowed to control their actions during minority. The law also gives the parent the right to use reasonable force to maintain his authority when it is disputed. Because he is bound to maintain his child, the parent is given the right to the latter's services and to his earnings. The father has a right to sue in his own name for the value of services rendered by his child to a third person. This right to claim whatever fruits may be the result of his child's labor may, however, be waived by the parent, and by such waiver the child becomes entitled to whatever he may earn. The putative father has, however, no right to the services or earnings of his illegitimate child.

EMANCIPATION.

219. By emancipation is meant the act or event by which the mutual rights and duties of parent and child are terminated. It may be effected either by the act of the parent or by operation of law.

Ordinarily these mutual rights and duties continue until the child arrives at the age of 21, at which time he becomes emancipated by operation of law. But the parent may, before the child has attained his majority, emancipate him by his own act. In many of the States in this country, statutes

provide that the child may be emancipated by the execution on the part of the parent of a formal written instrument. A mere oral emancipation would, however, undoubtedly be valid, and such emancipation may be implied from the circumstances in which the two are placed. The general effect of emancipation is to give the child the right to his own earnings, and usually to free him from the control of the parent, while it relieves the latter from his obligation to maintain the child.

GUARDIAN AND WARD.

220. A guardian is one who is intrusted by the law with the care of the person or estate of another who by reason of incompetency is disqualified from acting for himself. A person thus disqualified, by reason either of unsound mind, lack of age, or inexperience, and whose affairs have therefore been placed under the control of a guardian, is called a ward.

The most prominent form of guardianship is that over the interests of minor children. This form of guardianship, at the common law, was of four different kinds: (1) Guardianship by nature and nurture, which was the form of guardianship which the father, and, on his death, the mother, was entitled to exercise; (2) guardianship in socage, which existed at common law whenever an infant under 14 became the owner of real property. In such a case the nearest blood relation who could not possibly inherit such property became the guardian of the child; (3) testamentary guardianship, which exists where the father has, by his last will and testament, selected a person to act as guardian for his child; and (4) guardianship in chancery, where a court of equity selects the guardian. Of these four forms of guardianship,

all are in vogue at the present time, except guardianship in socage, which has passed into disuse.

THE RIGHTS AND DUTIES OF GUARDIANS.

221. Guardianship may be over either the person or the estate of the ward. A guardian of the person has substantially the same rights over his minor ward as a parent has over his child, with the exception that he has no right to the ward's services or earnings. His duties correspond to those of the parent, except that he is not bound to support the ward.

222. A guardian of the estate is a mere manager of the ward's property. He is bound, however, to support and educate the child out of the latter's estate.

223. A guardian may be appointed to take charge both of the person and of the estate of a ward.

Guardianship by nature and nurture involves control over the ward's person only, and does not extend to the management of his estate. Guardianship in socage probably extended to the heir's person and his real property, but not to his personal property. Testamentary guardianship usually involves control over both the person and property of the ward. Chancery guardianship may be either of the person or of the estate.

THE TERMINATION OF GUARDIANSHIP.

224. The relation of guardian and ward usually terminates when the ward attains his majority. It may, however, cease either wholly or partly upon the marriage of the ward.

Thus, if a female ward marries an adult, the guardianship is terminated both as to her person and her estate. If she marries a minor, the guardianship of her person ceases. If a male ward marries, the guardian has no further control over his person.

MASTER AND SERVANT.

225. A master is a person who has the right to control, within certain limits, the action of another, called a "servant," who, in turn, is bound to obey the master's commands.

226. Servants are of two kinds: apprentices and hired servants. An apprentice is a person who is bound out to another to learn a trade or profession. A hired servant is one who is bound to obey another's command by virtue of a contract between the two.

The relation of master and servant is, as has been seen, no longer strictly a domestic relation. There was a time in England when the principal classes of servants were domestic servants, whose relation to their masters was rather a relation of status than a contract relation. While slavery existed in this country, the same was true. At the present time, however, service is almost invariably the result of a contract between the two parties to the relation.

Apprenticeship is usually provided for by statute. Its original object was, no doubt, to enable the child to secure a thorough training in some useful trade, when the father was unable to give such training himself. Statutes usually provide that the father, the son, and the master must give their consent to the formation of the relation.

By far the largest class of servants are hired servants, who

usually agree, in consideration of wages, to place themselves under the control of their employer. As this relation depends almost entirely upon the terms of the contract by which it is entered into, it will not be practicable to lay down any general rules relating to the rights and duties of the parties thereto.

THE TERMINATION OF THE RELATION.

227. The termination of the relation may be effected in three general ways:

(a) By the death of either party.

(b) By the completion of the stipulated term of service.

(c) By the withdrawal from the relation of one of the parties, either with or without the consent of the other.

Being a purely personal relation, it is plain that the death of either party will render service no longer possible. If the parties have agreed that the service shall continue for a certain time, or until some definite work is completed, the expiration of that time or the performance of that work will terminate the relation. The relation itself will be ended also, when either of the parties withdraws therefrom. It is not meant by this that either party may withdraw at any time without subjecting himself to liability. For example, if the servant is employed for a particular time, and is wrongfully discharged, he may recover damages of the master for the breach of the contract. The relation, however, will terminate when the servant is discharged, however wrongfully.

CHAPTER XIV.

CORPOREAL AND INCORPOREAL HEREDITAMENTS.

228–229. Corporeal Hereditaments.
230–240. Incorporeal Hereditaments at Common Law.
241–244. Incorporeal Hereditaments in the United States.

CORPOREAL HEREDITAMENTS.

228. Hereditaments, under which term are included all forms of real property, are either corporeal or incorporeal.

229. Corporeal hereditaments include all real property of a visible and tangible nature. To this species of property the common law applied the term "land"; but land, in this sense, included, not only the soil itself, but also all houses or other buildings erected thereon, as well as all other objects permanently annexed thereto. It extended down to the center of the earth and upward to the highest heavens.

We have seen that the term "hereditaments" was used in feudal England to indicate such property as might be inherited; that is, such as was capable of passing to the heir, upon his ancestor's death, by operation of law. It will be shown later[1] that the law draws a distinction between the descent of personal property and that of realty. The latter passes to the heir immediately upon the death of the ancestor, while the former goes temporarily to the personal representative, that

[1] See post, chapter 18.

is, the executor or administrator of the estate, and is distributed by him according to the directions in the will of the deceased, or, if there is no such will, as the statute of distributions provides. Inheritance is the result of the law casting upon the heir, by its own power, and without the intervention of any act of the parties concerned, an estate after the ancestor's death. This attribute of inheritability belongs only to real property, and it is often the criterion in determining whether certain kinds of property are to be classed as real or personal.

Hereditaments comprise, in the main, therefore, immovables. But under the common law there were certain articles of property which, while movable, and therefore personal, in their nature, were yet inheritable, and classed as realty. These were called "heirlooms." In many of the old English families it was the custom to allow the heir to take, not only the real property, but many chattels as well. After a certain chattel had descended thus from ancestor to heir several times, it was regarded as inheritable by special custom, and was called an "heirloom." Heirlooms, in this sense, are not recognized by the American law.

By the old writers, the term "land" was used to denote all corporeal hereditaments. Besides including houses and permanent fixtures, the space above and the soil beneath the surface, it embraced the water which the soil supported; "and therefore," says Blackstone, "I cannot bring an action to recover possession of a pool or other piece of water by the name of water only, either calculating its capacity, as for so many cubical yards, or by superficial measure, as for twenty acres of water, or by general description, as for a pond, a water course, or a rivulet; but I must bring my action for the land that lies at the bottom, and must call it twenty acres of land covered with water. For water

is a movable, wandering thing, but the land which that water covers is permanent." [2]

INCORPOREAL HEREDITAMENTS AT COMMON LAW.

230. Incorporeal hereditaments included at the common law all rights of an intangible character which were permanent in their nature, and consisted principally of ten species:

(a) Advowsons;
(b) Tithes;
(c) Commons;
(d) Ways;
(e) Offices;
(f) Dignities;
(g) Franchises;
(h) Corodies;
(i) Annuities; and
(j) Rents.

231. An advowson was the right which the patron of a church or ecclesiastical benefice had to select the incumbent of that benefice.

232. A tithe was the right which such incumbent had to receive one-tenth of the income of the inhabitants of the parish.

Advowsons and tithes [3] were incident to the English ecclesiastical system. Every parish had its patron, who, by reason of his patronage, had a certain control over its affairs. This patron might be the crown or one of the archbishops, but was usually a bishop or a member of the

[2] 2 Bl. Comm. 18.

[3] For a discussion of advowsons and tithes, as well as the other common-law incorporeal hereditaments, see 2 Bl. Comm. c. 2.

nobility or gentry. One of the elements of the patron's power was the right to nominate the rector or vicar who was to officiate in the parish church and to be entitled to the emoluments incident to the benefice. The bishop was legally obliged to confirm the patron's nomination, or "presentation," as it was called, unless the candidate was canonically disqualified. This right of presentation was an advowson. It was not in any sense the ownership of the church, but merely a right to say who should be the clergyman of the parish. It was, however, a convenient way of providing for those in whom the patron was interested, and hence, being a right of some value, was regarded as a species of incorporeal property.

The enforcement of the right to tithes was the method employed by the English government to provide for the temporal welfare of the ministers of the established church. By virtue of this right, the rector or vicar became entitled to one-tenth of the net profits arising: (1) From the lands, such profit being in the form of grain, wood, etc., in which case the tithe was called "predial"; (2) from live stock, the profit being wool, milk, or the young of animals, when the tithe was said to be "mixed"; and (3) from personal industry, when it was called "personal." Because of this right or benefit of tithes, which was incident to the office of rector or vicar, the office itself was called a "benefice."

Owing to the complete separation of church and state in this country, the right to tithes is not recognized in the American law.

233. A common is the right on the part of one man to take a profit from the land of another.

The right of common in England grew out of the peculiar organization of the English manor. This was a tract of

land held by a lord, and occupied by him and his retainers. In the manor, there was usually a manor house, where the lord of the manor resided, and, not far away, a village. The land which was reserved by the lord for his own use and cultivation, and on which the manor house was situated, was called the "demesne land," and the rest of the arable portion of the manor, outside of the village, was either tenemental land or waste. The tenemental land was distributed among the free tenants. The waste was uncultivated, and was subject to the right of common, possessed by every inhabitant of the manor. This right was of four principal kinds, viz.: (1) Common of pasturage, or the right to pasture domestic animals thereon; (2) common of piscary, or the right to fish in the lakes or streams running through or bordering on the waste land; (3) common of turbary, or the right to take turf from the waste; and (4) common of estovers, or the right to take wood therefrom.

At a later period the right of common was extended so as to include any right on the part of one person to take pasturage, wood, turf, or fish, or any profit whatever, from the land of another. By profit in this sense is meant some corporeal thing actually removed from the other's land, and is to be distinguished from the mere right to pass over the land. It is immaterial whether the right arise by express grant of the owner or by operation of law. The right is recognized in this country, where, however, it is called "profit a prendre," or the right "to take a profit." [4]

[4] We have, in many parts of the United States, what are called "public commons," or "public parks." But the right of the people in these is more nearly in the nature of an easement than of a common, properly so called.

234. A way, or a right of way, is the right of one man to pass over the land of another.

A way does not, like a common, involve the right to take any corporeal thing from the land of another, but merely to cross it; and it does not usually give its possessor the right to cross now at one place, now at another, but merely the right to pass over the land at a particular place, selected with due regard to the convenience of both parties interested.

Ways are either public or private. A public way, or highway, is one held by the public, any member of which may use it, as a country road or a street. A private way is one possessed by a private individual.

Ways may originate either (1) by act of the parties, as in the case of an express grant or dedication; (2) by operation of law, as in case of a way by prescription; and (3) by necessity. A way by prescription is one which, having been used for a long period, is presumed by law to have been originally established by grant, although no such grant can be proven. A way of necessity exists where one man has sold to another a piece of land in the middle of his field. In such a case, the grantee has, of necessity, a right of way to and from his property.

Rights of way exist in the United States substantially as in England, being one of a number of incorporeal rights which are called "easements," and which will be referred to later.

235. An office is the right to exercise an employment, either public or private, and to receive whatever profits are derivable therefrom.

Offices, in England, were often in the nature of incorporeal hereditaments. They were either public or private. Blackstone mentions, as an example of a public office, a

magistracy, and he refers to bailiffs and receivers as private officers.

In this country, however, there is no such thing as a private office, an employment of such a nature being a mere agency, created by contract, and in no sense inheritable. Public offices are of great importance here, but are never held longer than for good behavior, and cannot be transmitted to the heir. They are, therefore, not hereditaments.

236. A dignity is the right to enjoy a title of nobility.

The leading dignities in England are those indicated by the titles of duke, marquis, earl, viscount, and baron. Titles of honor are not bestowed by the government in this country. The policy of the United States is so opposed to a titled aristocracy that congress has provided that no foreigner shall be admitted to citizenship until he shall have renounced any title of nobility that he may possess.[5]

237. A franchise is a portion of the sovereign power delegated to a private person.

The word "franchise" means primarily a freedom, or privilege. In the law, it indicates one of those extraordinary privileges which can be conferred only by the government. In England, these franchises were of great variety, and were conferred either by king's grant or by parliament. In this country, the creation of franchises is a legislative function. The most important franchises here are those given to corporations. The very right to exist as a corporation is in itself a franchise, and every special power which the corporation may possess also comes under that head. Franchises are less often held by private individuals, but they

[5] Rev. Stat. U. S. (1878) § 2165.

may be so held. Thus the right to vote is an individual franchise. In England they were often inheritable, but in this country they are not so, and cannot, therefore, be classed as hereditaments.

238. A corody is the right of one person to receive certain allotments of provisions for his maintenance. If, instead of receiving goods, he is entitled to certain payments in money, the right is called a "pension."

239. An annuity is the right of one person to receive a periodical sum of money from another by virtue of a voluntary obligation which that other has assumed.

The corody was usually due from an ecclesiastical person, while an annuity was from a temporal person. They are both merely personal charges, though inheritable under the English common law. In this country they are not hereditaments.

240. A rent is the right of one man to have rendered or returned to him a certain periodical profit out of lands held by another.

Ordinarily, when a rent is spoken of at the present time, a contract is contemplated by which one person agrees to pay a certain sum for the use of land or of personal property. Such a contract right would not, of course, be a hereditament. In the sense of the term here used, however, a rent is inheritable.

There were three forms of rent at the common law: (1) Rent-service; (2) rent-charge; and (3) rent-seck.

Rent-service was that form of rent where the profit con-

sisted in whole or in part of personal services on the part of the tenant. If he failed to perform the services, the landlord might reassume possession of the land, although no power of distress or re-entry was reserved in the deed by which the property was originally conveyed.

Rent-charge was that species of rent which existed where one had granted to another his whole interest in the land, reserving to himself an annual rental out of the land itself. In the absence of a special power of distress or re-entry, the grantor had no power to reassume possession upon default of payment of the rent; consequently a clause conferring such a power was almost invariably inserted in the deed. Such a rent was called a "rent-charge" because it was thus made a charge or burden on the land. If the rent was charged upon an estate in fee, it was called a "fee-farm rent."

If no such power of distress was reserved in the deed, it thus became a mere barren rent, or rent-seck.

There is no legal reason why these various forms of rent, as a hereditament, may not exist in this country. Many instances of them are in fact found in the United States.

INCORPOREAL HEREDITAMENTS IN THE UNITED STATES.

241. In this country, the only important incorporeal hereditaments are:

(a) **Profits a prendre;**

(b) **Rents; and**

(c) **Easements.**

242. An easement is the right on the part of the owner of land to some privilege or benefit in neighboring land held by another, such privilege or benefit involving no proprietary rights in the soil.

243. The essential features of an easement are:

(a) A dominant and a servient estate;

(b) A right on the part of the owner of the dominant estate to use the servient estate for some purpose, but not to take corporeal things therefrom; and

(c) A corresponding obligation on the part of the owner of the servient estate to allow such use.

We have seen that what we call a "profit a prendre" is identical with the right of common under the English law. We have, indeed, what are called "public commons" in this country; but they are rather in the nature of easements than of commons, as Blackstone uses the term. The essential distinction between a profit à prendre and an easement is that in case of the former there is a right to take from the soil some corporeal thing, while an easement is a right to some advantage in the land of another which does not involve the taking away of anything therefrom. Thus, if A. has a right to pass over the land of another with his horse and wagon, that right is an easement; but if he has a further right to stop and allow his horse to graze, or to take a load of turf or of fence rails, or anything, from the land, the right would be a profit à prendre.

Having already considered rent as an incorporeal hereditament, it will be unnecessary to discuss it further here.

An easement proper cannot exist independent of an ownership in lands. It must be possessed as an incident to an estate, and this estate, by reason of the fact that it is vested with a certain privilege or control over other land, is called the "dominant estate," while the estate subject to the easement is called the "servient estate." The right itself is called an

"easement" when we consider it from the point of view of the dominant estate, while the burden corresponding to it, and which rests upon the servient estate, is called a "servitude."

It sometimes happens that a right similar to an easement exists as a mere personal right, without any connection with a dominant estate, and such a right is often called an "easement in gross." But the right, under such circumstances, could not properly be called an easement.

244. The most important easements are:

(a) Ways, or rights of way;
(b) Rights in light and air;
(c) Rights in running water;
(d) Rights to lateral support; and
(e) Rights in party walls.

Rights of way exist in this country substantially as in England, and have already been explained.

It is well settled in England that an easement in light and air may be acquired by continued user for a requisite period. In this country the contrary doctrine is held. One may here build on his own land so as to shut out the light from the windows of his neighbor's house, so long as he does not act maliciously. Easements in light and air are therefore, in this country, usually the results of express grant.

It may be stated as a general rule that where a stream of water passes through the premises of one, and thence upon the land of another, the latter has the legal right to the use and benefit of the stream, and the former has no right to divert it from its course to the latter's detriment, nor to pollute it. He must not lessen its value to the lower proprietor in any way, beyond the mere reasonable use of

the water for irrigation, manufacturing, or household purposes.

In general, every owner of soil has a right to have his land supported in its natural position by the adjoining land. If the adjacent proprietor should make an excavation on his own land which causes his neighbor's land to cave in, he is liable to his neighbor for any damage occasioned thereby.

A party wall is a wall common to two adjoining buildings, which has become, either by agreement or by long-continued user, subject to mutual easements of support on the part of the owners of the two structures. Very frequently, those erecting buildings on adjoining parcels of land provide but a single wall, which is to be common to both structures. There is usually an agreement that this is to be a party wall. If so, each proprietor has a right to the support of the part of the wall owned by the other, and this right is an easement.

CHAPTER XV.

ESTATES IN REAL PROPERTY.

245–246. Estates in General—Tenants.
247. Classification of Estates.
248–250. Estates in Possession and in Expectancy.
251–256. Classification of Expectant Estates—Remainders.
257–258. Estates in Reversion and Executory Interests.
259–261. Freeholds and Estates Less than Freehold.
262–264. Freeholds of Inheritance and Not of Inheritance.
265–274. Classification of Estates for Life.
275–279. Estates Less than Freehold.
280–285. Estates in Severalty, in Joint Tenancy, and in Common.
286–292. Absolute and Conditional Estates.
293–297. Equitable Estates—Uses and Trusts.

ESTATES IN GENERAL—TENANTS.

245. An estate in real property is the interest which a tenant has therein.

246. A tenant is one who possesses an estate in real property.

The relations which persons bear to property may be considered in two ways. We may, on the one hand, regard the ownership and possession of the property in its isolation, showing the various kinds of interests which may be had in it; or we may consider how those interests may be acquired and transferred one to another. We will take up the study of real property from these two points of view, considering, first, interests or estates, and their classification; and, later, titles, which have reference to the transfer of estates.

We should distinguish the property from the estate which

a man may have therein. Property is the thing itself, in which an estate may be held; the estate, on the other hand, is the interest which a person may have in the property. The force of the distinction will be seen when we consider that in the same property there may be a number of estates, which may be different in many particulars from each other. Thus different persons may have estates in the same property at the same time. A. may own a half interest in a piece of land, while B. owns the other half interest. Each owns an estate different from what it would be were the property owned by either alone. Yet the property itself is unchanged.

CLASSIFICATION OF ESTATES.

247. Estates may differ from each other in the four following particulars:

(a) The time when their enjoyment is to commence.

(b) Their duration after they have begun.[1]

(c) The number and relation of the tenants.

(d) The conditions upon which they are held.

There are therefore classifications of estates based upon each of these four principles of division.

The tenant's interest obviously may be a present one, or it may not be capable of enjoyment until some future time. Again, having once begun, it may continue for one of a large number of different periods. It may be held by a single person or by two or more; and, if by more than one, the cotenants may stand in various relations to each other; and, lastly, there may, or there may not, be conditions annexed to its enjoyment.

[1] Blackstone refers to this as "the quantity of interest which the tenant has in the tenement."

ESTATES IN POSSESSION AND IN EXPECTANCY.

248. As to the time when the enjoyment is to commence, estates are divided into estates in possession and estates in expectancy.

249. An estate in possession is one where the right of present enjoyment is vested in the tenant.

250. An estate in expectancy is one the enjoyment of which cannot commence until some future time.

It should be observed that in the case of all expectant estates the estate itself is created at a time antecedent to that when enjoyment can commence. If the creation, as well as the enjoyment, of the estate were postponed until some future day, there would be no estate of any kind until that day arrived; and then it would be an estate in possession. But, if the estate is created to-day and the enjoyment is to begin at some future time, the tenant possesses the estate at once, although there cannot be any beneficial enjoyment of it until the time specified. An estate in expectancy becomes an estate in possession at the time the right of enjoyment begins.

CLASSIFICATION OF EXPECTANT ESTATES—REMAINDERS.

251. Estates in expectancy are either—

(a) Estates in remainder;

(b) Estates in reversion; or

(c) Executory interests.

252. An estate in remainder is one so created that it cannot be enjoyed until after the termina-

tion of another estate. The estate which thus precedes the estate in remainder is called the particular estate.

253. Estates in remainder are governed by the three following rules:

(a) There must be a particular estate precedent to the estate in remainder.

(b) The estate in remainder must pass out of the control of the grantor at the time of the creation of the particular estate.

(c) The remainder must vest in the grantee during the continuance of the particular estate or at the instant of its termination.

If A. should grant an estate to B. for life, remainder to C. and his heirs, B. would have, as long as he lived, an estate in possession, while C.'s interest during that time would be an estate in expectancy. B.'s estate is, in its relation to the remainder, a particular estate, which is said to support the remainder, for the remainder could not exist without it. In order that C.'s interest be a remainder, it must have been conveyed away from A. at the same time when B.'s interest was created. But it is not necessary that the interest in a remainder pass directly to a certain remainder-man at the time of the creation of the particular estate, for the identity of the remainder-man may depend upon a contingency. It is necessary, however, that, whether contingent or not, the person entitled to the remainder interest should be determined upon when the particular estate comes to an end.

254. Estates in remainder, or remainders, are either—

(a) Vested or

(b) Contingent.

255. A vested remainder is one granted to a definite person, and the enjoyment of which begins upon the happening of a certain event.

256. A contingent remainder is one where the remainder-man is uncertain, or the enjoyment of the estate depends upon the happening of some uncertain event.

The example already mentioned, in which A. grants an estate to B. for life, remainder to C. and his heirs, would be an illustration of a vested remainder. Here the remainder-man, C., is a definite person, and there are no conditions annexed to his enjoyment of the estate. But if A. should grant the estate to B. for life, remainder to the sons of C., share and share alike, if C. had no sons at the time the estate was created, the remainder would be contingent until a son was born, when it would become vested. Again, if A. grant the estate to B. for life, remainder to C., provided he marry a certain lady, although the person of the remainder-man is certain, his enjoyment of the estate depends upon an event which may or may not happen. While C. refrains from marrying the particular person, his estate is purely contingent. If the particular estate is terminated before the marriage takes place, the remainder is gone forever, because the marriage is a condition precedent to his taking the estate, and there is no longer any particular estate to support the executory interest. If the marriage takes place before the termination of the particular estate, the remain-

der ceases to be contingent, becoming vested the moment the condition is fulfilled.[2]

ESTATES IN REVERSION AND EXECUTORY INTERESTS.

257. An estate in reversion is that estate which is retained by the grantor after he has granted away a particular estate less than his own.

Thus, if A., having an estate for ten years, grants to B. an estate for five years, he reserves to himself the balance of

[2] The rule in Shelley's Case. This celebrated rule was laid down in 1 Coke, 104a, and related to cases where an estate had been granted to one person, with a remainder to his heirs in the same instrument. It was stated as follows: "It is a rule of law when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited mediately or immediately to his heirs in fee or in tail, that always in such case 'the heirs' are words of limitation of the estate, and not words of purchase." To illustrate: If an estate was granted to A. for life, remainder to his heirs, the question would at once arise whether the heirs of A. took thereby a vested estate in remainder or whether the words "the heirs" were merely words introduced to describe the estate of A., as if the grant had read "to himself and his heirs forever." If the last construction should prevail, A. might convey away the whole property, disinheriting his heirs. The words "the heirs" would then be words merely of limitation or description of the estate. If, however, they were words of purchase, A. could but hold the property during his life, and upon his death it would necessarily go to his heirs, the heirs standing in the same position as any other remainder-men. These words were held in Shelley's Case to be words of limitation of the estate.

The rule in Shelley's Case has been abolished by statute in Alabama, Connecticut, Kentucky, Michigan, Missouri, New York, Tennessee, Virginia, and Wisconsin. In New Hampshire, New Jersey, and Ohio, it is abolished as to conveyances by will. In most of the other states it is in force.

his original estate after the particular estate granted to B. is terminated. This balance which remains vested in him is called an estate in reversion, because it reverts back to him when B.'s estate comes to an end. It is similar to an estate in remainder, both depending upon the existence of a precedent particular estate; but it differs from the remainder in that the reversion is vested by operation of law in the grantor, while a remainder interest passes to some other than the grantor, a voluntary act on the part of the latter being necessary for its creation. If, in the illustration given above, A. had granted an estate for five years to B., and the remainder of his interest to C., a remainder would have been created; but if he had merely granted C. the estate for five years, saying nothing about the balance, he would naturally retain it, thus becoming a reversioner.

258. An executory interest is an estate granted to another to take effect at some future time, there being no particular estate to support it.

Executory freehold interests could not be created under the common law except by will, in which case they were called executory devises.[3] They can now usually be granted, subject to the restriction that they must not commence at a day more distant from the grant than the duration of a life or lives in being and 21 years afterwards.

FREEHOLDS AND ESTATES LESS THAN FREEHOLD.

259. As to their duration after they have begun, estates are either freeholds or estates less than freehold.

[3] The reason of this was that for the creation of a freehold livery of seisin was necessary. From its very nature this could not take place in futuro.

260. A freehold[4] estate is an estate for life or for a greater period of uncertain duration.

261. An estate less than freehold, often called a leasehold, is an estate held for a certain period, or for an uncertain period less than life.

Many of the distinctions drawn and the phraseology used in the modern law of real property are of feudal origin. The term "freehold" was used in early English law to indicate an estate which was of such dignity that its ownership was becoming to a freeman. An estate for a certain time was not regarded as of such dignity, because it was necessarily limited in its duration. An estate for life, on the other hand, might be held by him as long as he was able to enjoy any estate personally, and hence was regarded as a freehold. Even an estate for a thousand years was regarded less in its dignity than an estate for life. If the estate was to continue for a person's life, and then to descend to his heirs, it was, of course, a freehold. We have, therefore, these two general kinds of estates. A freehold estate is also called a real estate in real property, while an estate less than freehold is a personal estate in real property, and is referred to, as will be seen in a subsequent chapter, as a chattel real.

[4] A freehold is defined by Blackstone as "such an estate in lands as is conveyed by livery of seisin or, in tenements of any incorporeal nature, by what is equivalent thereto." Livery of seisin was a formal delivery of the ownership of the property. It was customary for the grantor and the grantee to go upon the property, and, corporeal delivery of the entire land being impossible, the former would, in the presence of witnesses, pluck a twig from the tree, or take a piece of turf from the land, and hand it to the grantee, such delivery of a part symbolizing the delivery of the whole.

FREEHOLDS OF INHERITANCE AND NOT OF INHERITANCE.

262. Freeholds are subdivided into—

(a) Freeholds of inheritance; and

(b) Freeholds not of inheritance. Freeholds not of inheritance are estates for life.

263. Freeholds of inheritance are called "fees," and are divided into estates in fee simple and estates in fee tail.

264. An estate in fee simple is an estate granted to a person and his heirs in general. An estate in fee tail is an estate granted to a person and certain particular heirs.

There were, at the time when the feudal system was in force, certain lands which did not come under its operation. These were called allodial lands. The owner of such lands had free control over them, not holding them of any superior lord. The interest which the owner of an allodium had was not called an estate, for he was not regarded as a tenant, but a proprietor. Those lands which came under the operation of the feudal system could not be thus independently owned. All that the tenant could possess was an estate in them, and the fee simple was the greatest of all the various estates which he might hold. The practical difference between an estate in fee simple and the interest of an allodial proprietor was that the former was held by tenure, to which various services were attached, while the latter was free from all feudal conditions. In the United States, while all interests in lands are commonly referred to as estates, and

the distinctions between the different kinds of estates are in full force, lands are for all practical purposes allodial.

The conveyance or grant of a fee simple estate is usually couched in the following terms: "To have and to hold to himself and his heirs forever." There is, in such a grant, no attempt to restrict or entail the estate to any particular heirs; but if the grant should read, "to himself and the heirs of his body forever," it would be an estate in fee tail, being restricted to certain particular heirs,—that is, to his issue. The statute de donis prevented the alienation by tenant in tail so as to defeat heirs in tail.

When an estate is granted to a man and the heirs of his body generally, it is called an estate tail general; but if granted to one and certain particular heirs of his body, as, for example, those "by his present wife begotten," it is an estate tail special. If granted to him and the male heirs of his body, it is called an estate tail male; if limited to the female heirs of his body, an estate tail female.

In most of the states of the United States, estates tail have either been abolished or so modified as to be entirely different from their English original. They are usually either turned into fee simples or held to create estates in the grantee for life, remainder to the specified heirs in fee simple.

CLASSIFICATION OF ESTATES FOR LIFE.

265. An estate for life is one so created as to continue during the life of some specified person.

266. Estates for life are either—

(a) Legal, that is, such as are created by operation of law; or

(b) Conventional, that is, such as are created by act of the parties.

267. The legal life estates are three:

(a) Estates tail after possibility of issue extinct;

(b) Estates by the curtesy; and

(c) Estates in dower.

268. Conventional life estates are either—

(a) Such as are to continue during the tenant's own life; or

(b) Estates pur autre vie, which terminate with the life of some person other than the tenant.

269. Estates tail after possibility of issue extinct can exist only when, in case of an estate granted in fee tail special, there is no further chance for heirs capable of inheriting the estate to be born.

Thus, if an estate is granted to A. and the heirs of his body by his present wife, the death of the wife would make the possibility of issue extinct, and the estate would thereafter be a mere life interest. It would be impossible for such an estate to arise in case of an estate in fee tail general, because, the estate being limited to the heirs of his

body, the moment the possibility of issue was made extinct by his death, the estate would cease also.

270. An estate by the curtesy is a life estate, to which the husband becomes entitled upon the death of his wife, in all the real property of which she has been seised of an estate of inheritance at any time during coverture.

271. The essentials of an estate by the curtesy are:

(a) **A lawful marriage.**

(b) **Seisin by the wife of an estate of inheritance during coverture.**

(c) **Issue born alive during the life of the wife, and capable of inheriting the estate.**

(d) **The death of the wife.**

It has already been observed that, at the common law, the husband was entitled, during coverture, to the rents and profits of his wife's real property. He had this right by virtue of the marriage relation itself, and it ceased when that relation terminated. But if issue capable of inheriting the property were born, he had an additional right or estate in it—the estate by the curtesy—the enjoyment of which was, however, conditional upon his surviving her. From the time of the birth of issue until the death of the wife, this interest was called an estate by the curtesy initiate; after her death, an estate by the curtesy consummate.

The right to the rents and profits of the wife's realty during coverture, which existed at the common law, has quite generally been abolished by the married woman's acts in this country. The estate by the curtesy has also been abolished in many of the states.

272. An estate in dower is a life estate, to which the wife becomes entitled, upon the death of her husband, in one-third of all the real property of which he was seised of an estate of inheritance at any time during coverture.

273. The essentials of dower are:

(a) A lawful marriage.

(b) Seisin during coverture of an estate of inheritance by the husband.

(c) The death of the husband.

Dower is the counterpart of curtesy. The principal points of distinction between the two estates are that curtesy vests in the husband, dower in the wife; to curtesy, the birth of issue is essential, while it is not necessary to dower; curtesy covers all property of the wife which the issue might by any possibility inherit, while dower gives a right only to one-third of the husband's property.

Dower exists in its common-law form in most of the American states.

274. A tenant pur autre vie is one who holds an estate during the life of another. The one for whose life he so holds it is called the cestui que vie.

If the tenant pur autre vie survive the cestui que vie, the estate ceases at the latter's death. If the tenant, however, dies before the cestui que vie, the estate is not terminated. At the common law this presented a peculiar situation. The reversioner had no right to take the land, because the particular estate had not come to an end; the heir could not take it, for it was not an estate of inheritance; the personal representative could not, because it was not a chattel but a freehold interest. Consequently it belonged to nobody, and

whoever came first upon the land and took possession could legally hold the property until the death of the cestui que vie. Such a person was called a general occupant. In some of the states of this country, by statute, the estate would, in this contingency, go to the heirs of the tenant pur autre vie; in others, to his personal representative.

ESTATES LESS THAN FREEHOLD.

275. Estates less than freehold are four:

(a) Estates for years;

(b) Estates from year to year;

(c) Estates at will; and

(d) Estates at sufferance.

276. An estate for years is one created to exist for a certain specified time.

277. An estate from year to year is one created to exist for an indefinite number of definite periods of time, and which may be brought to an end by either party, upon due notice to the other, at the end of any one of these periods.

278. An estate at will is an estate created for an indefinite time, and terminable at the will of either party.

279. An estate at sufferance is an estate for an indefinite time, existing where a tenant wrongfully holds the possession of property after the termination of an estate by virtue of which he had rightful possession. It may be terminated at any time by the entry of the owner upon the property.

In order to constitute an estate for years, it is not necessary that the time for which it is to continue should be a

year, or any number of years. It may be for a week, a month, a quarter, a year, or any definite period.

If an estate is strictly at will, it may be terminated by either party at any time. It is customary, however, for statutes to require that a certain notice be given before either party can bring it to an end.

Estates from year to year partake of the nature both of estates for years and of estates at will. They were originally estates at will where it was customary to pay rent periodically, that is, by the week, month, year, etc. It was early provided that where rent was thus paid by the lessee, the lessor could not terminate the estate except upon sufficient notice to the lessee of his intention to do so. As to the time when notice must be given, statutes are widely divergent; but the time when the party is able to bring the estate to an end corresponds to the time when an installment of rent is payable. The necessity of giving notice rests upon the lessee as well as upon the lessor.

The tenant at sufferance has only a wrongful possession of the property. Examples of his estate are: Where the tenant holds over after the termination of an estate for years, at will, or from year to year; where the tenant pur autre vie holds over after the death of the cestui que vie; where an undertenant holds over after his landlord's tenancy has expired.

The relation which exists between the tenant for years, at will, from year to year, or at sufferance, and the one from whom he holds, is called the relation of landlord and tenant.

ESTATES IN SEVERALTY, IN JOINT TENANCY, AND IN COMMON.

280. As to the number and relation of the tenants, estates are either estates in severalty, estates in joint tenancy, or estates in common.

281. An estate in severalty is an estate which is held by one tenant only.

282. An estate in joint tenancy is one which is held by two or more tenants jointly.

283. In order to create a joint tenancy there must coexist what are known as the four unities:

(a) Unity of time;

(b) Unity of title;

(c) Unity of interest; and

(d) Unity of possession.

284. The characteristic feature of every joint tenancy is the right of survivorship. By this is meant the right which the surviving joint tenants have to the interest of a particular tenant after his death, to the exclusion of his heirs.

The legal conception of a joint tenancy is a highly artificial one. Each tenant is seised of the entire estate. He is said to hold "per my et per tout,"—not only his own half, but all; and this is true, except for purposes of alienation. One joint tenant may dispose of his share to a stranger; the latter, however, becoming a tenant in common, instead of a joint tenant with the others.

There must be unity of time (that is, it is necessary that the interests of the various joint tenants begin at the same time), unity of title (that is, their title must have been ac-

quired by the same act or event), unity of interest or estate (that is, the duration of the estate must be the same as to both tenants), and unity of possession (that is, they must hold the property jointly).

The right of survivorship results naturally from the nature of the estate. There being but one estate, which each tenant holds in its entirety, if one tenant dies there is no part of the estate which could properly vest in the heir, because the ownership of the whole by the others continues. The survivors do not get any additional interest by the death of the one. They merely continue to own the estate they had before. While one joint tenant is allowed to sell his interest during life, he cannot dispose of it by will, because that would defeat the right of survivorship. Nor does the wife or husband of a joint tenant have dower or curtesy in the interest after the tenant's death.

When an estate is granted jointly to husband and wife, it assumes a character somewhat different from the ordinary joint tenancy, and is called an "estate in entirety." During coverture the husband has full control over the estate, and may convey it subject to the wife's right of survivorship. This right of survivorship cannot be destroyed by either party, and there can, therefore, be no partition of the estate.

285. An estate in common is an estate held by one, the possession of which is united with that of an estate held by another in the same property.

The only requisite of estates in common is that there be unity of possession. The estates may be acquired at different times; they may be had from different grantors in different ways; they may be held for different periods, each being either in fee, in tail, for life, for years, at will, etc.; but, if they are possessed together in the same prop-

erty, they are estates in common. The interests may be unequal. One may, for example, own a quarter interest, while his cotenant has the residue, or they may be equal, each holding an undivided half. One tenant in common may alien his interest to a stranger, and the latter will become a tenant in common, having exactly the same interest that his grantor held. In fact, the estates held by tenants in common are distinct interests, coming into relation with each other merely because they are held in the same property.

If the land were to be divided into separate parcels proportionate to the amount of the various interests of the tenants, as may be done by partition, the tenancy in common would cease, because unity of possession no longer exists. The estates would not then be in the same property, but in different parcels.

ABSOLUTE AND CONDITIONAL ESTATES.

286. As to the conditions upon which they are held, estates are either absolute or conditional.

287. An absolute estate is one which vests in the tenant unconditionally.

288. A conditional estate is one whose existence is made to depend upon the happening or not happening of some uncertain event.

289. The principal conditional estates are:

(a) Estates upon condition;

(b) Estates upon conditional limitation; and

(c) Estates in mortgage.

290. An estate upon condition is one so created that it becomes vested or enlarged, or is defeated, upon the happening or not happening of some uncertain event.

This is the typical form of a conditional estate. If the condition annexed to it is one upon the performance of which the estate is to become vested or enlarged, it is called a "condition precedent"; as if an estate should be granted to one upon condition that he marry within a certain time, or if one should grant an estate for life to A., and, provided A. pay a certain sum, then to himself and his heirs forever. On the other hand, if the estate is made to vest at once, subject only to defeat in case of breach of the condition, it would be a condition subsequent. As an example of a condition subsequent, the case of an ordinary conveyance of a city lot, with building restrictions, might be cited. Such a conveyance usually consists of a grant of an estate in fee simple, subject to the condition that B. shall build upon the lot, within a certain time, a house of a certain value.

Conditions may be express or implied. An express condition, also called a "condition in deed," is one which is created openly in the instrument which conveys the estate. An implied condition is one which arises by operation of law, as an incident to an estate.

Upon breach of the condition in an estate upon condition subsequent, the estate does not immediately come to an end, but is merely subject to forfeiture by the grantor, who may then re-enter at once upon the property. But this right to declare the estate forfeited may be expressly or impliedly waived. When the condition is precedent, it must be performed before the estate can vest or be enlarged.

291. An estate upon conditional limitation is one limited in its duration to the time when a particular event shall happen.*

For example, an estate granted to a widow, to hold "so long as she remains unmarried," would be a conditional limitation. The moment the widow remarries, the estate ceases. Hence it is the leading distinction between such an estate and one upon condition that while, in case of the former, no act is necessary to terminate the estate upon breach, it reaching the limit of its existence the moment the condition is broken, the estate upon condition requires an act of re-entry on the part of the grantor to bring it to an end.

292. An estate in mortgage was, at the common law, a species of estate upon condition, existing where real property had been conveyed to secure the payment of the mortgage debt.

This theory of a mortgage is still adhered to in many of the American states. In others a mortgage is regarded as a mere lien upon property.

* It is believed that this view of the nature of a conditional limitation is the one most in accordance with authority as well as reason. There are, however, eminent writers who prefer to use the term to indicate, not the estate which comes to an end by the limitation, but the estate which is thus brought into existence. For example, Mr. Tiedeman says: "A conditional limitation is an estate limited to take effect upon the happening of the contingency, and which takes the place of the estate which is determined by such contingency." Tied. Real Prop. § 281. But see Washb. Real Prop. pp. 23, 26.

EQUITABLE ESTATES—USES AND TRUSTS.

293. An equitable estate is one which is recognized and protected only by courts of equity.

294. Equitable estates usually take the form of uses or trusts. A use exists where a legal estate is vested in one person, who is required to hold the property to the use of another.

295. He who holds property to the use of another is called a "feoffee to use." He who has the beneficial interest is called the "cestui que use."

296. A trust estate is substantially the same as a use. Here, however, the person having the legal estate is said to hold it "in trust for" the other.

297. He who holds property in trust for another is called a "trustee." The one for whose benefit it is held is known as the "cestui que trust."

The trustee, or feoffee to use, is said to hold the legal estate, his interest being the only one which is recognized in the courts of law; while the interest of the cestui que use or cestui que trust is a purely equitable estate.

The trust is the historical successor to the use. In tracing their development, we find that five points are to be considered: (1) The conditions previous to the statutes of mortmain; (2) the acts of mortmain, and their effect; (3) their evasion by the use; (4) the statute of uses; and (5) the invention of the trust.

During the period immediately preceding the granting of the Great Charter (1215), the church had, through its ecclesiastical corporations, attained to great wealth and power. The accumulation of lands by the great religious houses had gone so far that at one time it is said that fully one-fourth

the lands of England were in the hands of the clergy. Lands held by the religious corporations were practically unproductive to the lords of whom they were held; and hence it became the aim of the nobles, as well as of the king, to prevent a further absorption in manus mortuas or into these dead or unproductive hands, of the realty of the realm.

This condition led to the passage of the acts of mortmain, the effect of which was to make grants of land to corporations, whether ecclesiastical or otherwise, absolutely void. These acts were passed at various times, from 1217 down to the reign of Henry VIII.

The result of these acts was to stimulate the ecclesiastics to discover some means of evading them. They adopted the plan, until then almost unknown, of granting the estate to a feoffee to use, to hold to the use of the corporations. The common-law courts recognized the title to be in the feoffee, and hence held that this was no violation of the mortmain statutes. But the court of chancery,—the chancellor himself being usually an ecclesiastic,—aiming to carry out the actual intent of the parties, would compel the feoffee to hold the estate to the use of the corporation.

This led to the enactment of the statute of uses, in the reign of Henry VIII. (1535). This statute provided that, wherever the use was, there should the legal estate be, also. It was called the "Statute for Transferring Uses into Possession." If, therefore, an estate was granted to A., for the use of a corporation, the statute operated to convey the legal estate to the corporation which had the use. The conveyance would thus become practically a grant to the corporation, and was void, under the statutes of mortmain.

The legal and equitable estates being then in the same person, the common-law courts took cognizance of uses. It soon became the settled principle with them that a use could not be limited upon a use; that is, in a grant to A. to the use

of B. to the use of C., the last use was void. Hence B., having the equitable estate, would be recognized as the legal owner of the land. But here, again, chancery interfered to protect the interests of the church. The chancellor held that he would enforce a use which was limited upon a use. The common-law courts, in the illustration just given, would not recognize the title as passing, by the statute of uses, any further than B., and consequently such a grant was not in violation of the acts of mortmain. The chancellor, however, would compel B. to hold in trust for C., and the statutes were once more evaded.

The trust estate, then, in its original, was merely a use limited upon a use. In its modern form, however, the intermediate use is discarded, being no longer necessary, and the trust and the use are identical. Trust estates are of very great importance in the modern law.

CHAPTER XVI.

TITLES TO REAL PROPERTY.

298. Titles in General.
299–300. Title by Descent and Title by Purchase.
301–304. Classification of Titles by Purchase.
305. Title by Escheat.
306. Title by Accretion.
307. Title by Abandonment.
308. Title by Forfeiture.
309. Title by Prescription.
310. Title by Adverse Possession.
311. Title by Marriage.
312–315. Title by Alienation.
316. Title by Execution.
317. Title by Judicial Decree.
318. Title by Eminent Domain.
319. Tax Titles.
320–322. Title by Devise and Title by Grant.
323. Title by Grant.
324. Public Grant.
325–327. Private Grant.
328–333. Classification of Deeds—Common-Law Deeds.
334–335. Deeds in the United States.

TITLES IN GENERAL.

298. A title to real property is the means by which an estate therein is held.

A title is sometimes said to be the means by which an estate is acquired. But the conception of the term adopted by the best authorities seems to be that the title is rather the result of the acquirement of an estate than the means of acquiring it. Thus, we speak of one having a title by descent or inheritance. Here the means or process of ac-

quiring is called "descent." The title is that which is so acquired.

What, then, is this product of the transfer; this which we call "title"? Blackstone, following Lord Coke, says that it is "the means whereby the owner of lands hath the just possession of his property." [1] And he adds that a complete title involves the actual possession, the right of possession, and the right of property. Professor Walker says: "The truth is that title means the same thing as ownership." [2] Adopting this view, we may say that the property is the thing which is held, the estate is the interest which the tenant has in the property, while the title, to speak figuratively, is a handle which enables the tenant to firmly grasp his estate; in other words, title is the means by which he holds his interest.

Titles to real property are, however, usually considered in the law only with reference to the means by which they are acquired.

TITLE BY DESCENT AND TITLE BY PURCHASE.

299. Title by descent is that title which is acquired, by operation of law, by an heir in the property of an ancestor upon the latter's death.

300. Title by purchase includes all forms of title except that by descent.

The consideration of title by descent will be postponed to a subsequent chapter on the law of succession after death.[3]

The word "purchase" is here used in a much more enlarged sense than the nonprofessional reader is accustomed

[1] 2 Bl. Comm. 195.

[2] Walk. Am. Law, 378.

[3] See post, c. 18.

to attach to it. The popular meaning of the term is "to buy." But title by purchase includes, not only titles which result from the buying of property, but also titles by the will of a deceased person, and many others which result purely from the operation of law.

CLASSIFICATION OF TITLES BY PURCHASE.

301. Title may be acquired by purchase in two ways:

(a) By operation of law; and,

(b) By alienation.

302. Title by operation of law is that title which is acquired by virtue solely of the working of some legal principle, and without an act on the part of any person.

303. Title by alienation is that which is acquired as the result of an act on the part of one or more persons.

304. Title by operation of law is of seven different kinds:

(a) By escheat;

(b) By accretion;

(c) By abandonment;

(d) By forfeiture;

(e) By prescription;

(f) By adverse possession; and

(g) By marriage.

With reference to title by operation of law, it should be observed that it is confined to cases where the transfer is by operation of legal principles alone, and does not include transfers by the act of the agents of government. Thus,

land sold for the nonpayment of taxes would not be transferred by operation of law, but by alienation.

TITLE BY ESCHEAT.

305. Title by escheat is that which the state acquires in property by operation of law when the owner thereof dies intestate and without heirs.

Escheat (from the French word "eschoir," meaning "to happen") was the term applied under the feudal system to the reverting of an estate back to the feudal lord when there was default of inheritable blood after the death of the tenant. The feudal doctrine was, it will be remembered, that all lands were held immediately or mediately of the king; and the final escheat would therefore be to the crown. By analogy to this feudal idea, the state, in this country, takes property of which there is no other owner; and, if the want of an owner results from the failure of heirs, it takes its title by escheat.

TITLE BY ACCRETION.

306. Title by accretion is that which is acquired by the owner of lands in such additional soil as is added gradually to it by natural forces.

This addition of soil is ordinarily the result of alluvion. It has been seen in the discussion of the subject of fixtures that whenever property is permanently annexed to land it becomes part of that land. It is upon the same principle that soil gradually washed up by the sea or other waters, which is said to be added by alluvion, becomes the property of the owner of the soil to which it attaches itself.

TITLE BY ABANDONMENT.

307. Title by abandonment is that which the owner of the legal estate in lands may acquire by operation of law when an incorporeal hereditament, equitable estate, or executory interest in those lands is given up.

The effect of the abandonment of such rights or interests is to release the property from them. Mere nonuser will not be sufficient to produce this effect. Some act of abandonment must take place.

TITLE BY FORFEITURE.

308. Title by forfeiture is that which may be acquired by the grantor of an estate upon condition subsequent upon breach of such condition by the grantee.

This usually requires an act of re-entry on the part of the grantor, and, unless he re-enters within a proper time, the breach of the condition will be considered as waived.

TITLE BY PRESCRIPTION.

309. Title by prescription is that which is acquired in an incorporeal hereditament by one who has used it adversely for a certain period.

The characteristic of title by prescription is that after a certain time, during which the incorporeal hereditament is in use by a particular person, he is presumed to have obtained the right to it originally by grant. The period of adverse user necessary is, in most jurisdictions, 20 years.

TITLE BY ADVERSE POSSESSION.

310. Title by adverse possession is that which is acquired in lands by one who has occupied them adversely for a certain time.

This mode of acquiring title is similar to that by prescription, but differs from it in two particulars: (1) That by it a title to lands is obtained, while prescription applies to incorporeal property; and (2) that no grant is presumed.

TITLE BY MARRIAGE.

311. Title by marriage is that which either husband or wife acquires in the real property of the other by virtue of their relationship.

Thus, estates in dower and by the curtesy are held by this title.

TITLE BY ALIENATION.

312. Title by alienation may be either:

(a) By involuntary alienation, or

(b) By voluntary alienation.

313. Title by involuntary alienation is that which is acquired by the act of some one other than the former owner of the property.

314. Title by voluntary alienation is that which is acquired by the act of the former owner of the property, either with or without the concurrent act of some other person.

315. The principal forms of title by involuntary alienation are:

(a) Title by execution;
(b) Title by judicial decree;
(c) Title by eminent domain; and
(d) Tax titles.

TITLE BY EXECUTION.

316. Title by execution is that title to property which is acquired when such property is sold to satisfy the judgment of a court of law.

The decision of a court of common law upon a case presented to it is called a "judgment." In its nature it is merely a statement of the conclusion reached as to the rights of the parties. In order to enforce the rights as thus determined, it is necessary to issue what is called a "writ of execution," by which the sheriff or other executive officer is usually directed to satisfy the judgment debt out of the property of the defeated party. The officer is ordinarily required to levy first upon the personal property of the defendant; and, if there is not sufficient of it to satisfy the judgment, his real property may be seized and sold. The title which is transferred by this sale is called "title by execution."

TITLE BY JUDICIAL DECREE.

317. Title by judicial decree is that which is acquired to property transferred by virtue of a decree of a court of equitable jurisdiction.

Courts of equity have in many cases the power to decree the sale of lands. For example, the equitable foreclosure of a mortgage sometimes results in a decree by which the title to the property becomes vested in the mortgagee; and many other instances might be cited.

TITLE BY EMINENT DOMAIN.

318. Title by eminent domain is that title which the government or a public or quasi public corporation acquires in real property when such property is taken for the public use.

This form of title is that which is acquired by the right of eminent domain, which has already been mentioned. The power to take lands by eminent domain is vested in the government, but may be delegated by the legislature to corporations of a public or quasi public character; as cities, railroad companies, etc.

TAX TITLES.

319. A tax title is the title which is acquired by the purchaser of land which is sold by a public officer for the nonpayment of taxes assessed thereon.

When a tax has been levied on lands, and has not been paid, statutes usually provide, as a means of enforcing the payment of the tax, that a public officer, usually the tax collector, may, after a certain time has elapsed, and after the lands have been properly listed and the sale advertised, sell at public sale so much of the lands as is necessary in order to pay the tax and the expenses of the sale. Such a sale, when all formalities have been complied with, vests an absolute title to the property so sold in the purchaser, and this title is called a "tax title."

TITLE BY DEVISE AND TITLE BY GRANT.

320. Title by voluntary alienation is of two general kinds:

(a) Title by devise, and

(b) Title by grant.

321. Title by devise is that title to real property acquired at the death of the devisor by virtue of his last will.

322. Title by grant is that which is acquired by virtue of a formal conveyance of the property from one person to another.

The nature of devises will be considered in a subsequent chapter, on the law of succession after death.[4] It should be observed that the term "grant" is here used in a general sense, as including any form of voluntary conveyance except a will. Title by grant is the most common form of title to real property.

TITLE BY GRANT.

323. Title by grant is of two kinds:

(a) Title by public grant or by patent, and

(b) Title by private grant, or by deed.

SAME—PUBLIC GRANT.

324. Title by public grant is that which is acquired in lands previously owned by the government by virtue of a formal conveyance thereof,

[4] See post, c. 18.

executed by the proper officers, to a private person. This instrument of conveyance is called a "patent."

At the time of the organization of the United States government, the federal government found itself in possession of various lands to which it had the fee-simple title; and since then it, as well as the governments of the various States, has acquired other lands in divers ways. Many of these lands were occupied by Indian tribes; but it was early held that the right of these tribes to the soil was merely a right to use and occupy it. This right has always been protected. It can only be divested by purchase or conquest, and our government has adopted the former method.

A large proportion of the land so held was soon placed on sale by the government of the United States; and, to supervise and manage the sales, there was established what has since been known as the "General Land Office." This was at first subordinate to the treasury department, but was afterwards transferred to the department of the interior. Various local land offices, under the control of the general office, have been established throughout the country at convenient points. Many of the states have established similar bureaus for the purpose of managing their own landed interests.

The patent is the instrument used by the government to convey the title to these lands to private persons. It is usually signed by the president, or by some one appointed to sign in his stead, and is sealed with the great seal of the United States. If the patent is properly executed, a perfect title to the property vests in the patentee. The title of more than one-half of the entire land in the United States may be traced back to the government.

SAME—PRIVATE GRANT.

325. Title by private grant is that which is acquired in lands previously owned by a private person, by virtue of a deed of conveyance.

326. A "deed," in the widest sense of the term, is a contract under seal. In this sense it is synonymous with a "covenant" or "specialty."

327. In connection with the law of real property, however, the term "deed" is used in a narrower sense, to signify an instrument, usually under seal, by which an estate in such property is granted by one private person to another private individual or to the state, or whereby an estate already thus granted is enlarged or modified.

In England it is provided by the statute of frauds that a written instrument is necessary for the voluntary alienation of lands, tenements, and hereditaments, or any interest in or concerning them. In most of the American States a sealed instrument is required, though in some States it is provided that no conveyance shall be invalid for want of a seal.

CLASSIFICATION OF DEEDS—COMMON-LAW DEEDS.

328. Deeds are usually classified into original deeds and derivative deeds.

329. An original deed is one which creates an estate.

330. A derivative deed is one which enlarges or modifies an estate already created.

331. At the common law there were six principal species of original deeds:

(a) Feoffment;
(b) Gift;
(c) Grant;
(d) Lease;
(e) Exchange; and
(f) Partition.

332. The common-law derivative deeds were five:

(a) Release;
(b) Confirmation;
(c) Surrender;
(d) Assignment; and
(e) Defeasance.

333. Under the statute of uses there sprung up five new forms of deed:

(a) Covenant to stand seised to uses;
(b) Bargain and sale of lands;
(c) Lease and release;
(d) Deed to declare uses; and
(e) Deed of revocation of uses.

A feoffment was a deed which created a fee-simple estate. It was accompanied by livery of seisin, or the actual corporeal delivery of the property. A gift, as a conveyance, was a deed creating a fee-tail estate. A grant, in this sense, was a conveyance of the title to an incorporeal hereditament. A lease was the conveyance of an estate less than that held by the grantor; as where one holding an estate in fee granted to another an estate for years in the property. An exchange was a deed transferring equal interests, one in consideration for the other. In case of an exchange it is the interests or estates which must be equal,

as fee simple for fee simple; not the values of the two pieces of property. A partition is a deed creating several estates out of estates in joint tenancy or in common.

A release was the conveyance of an expectant interest in property to one having the estate in possession; as, for example, the transfer of the remainder or reversion to the particular tenant. A confirmation was a deed confirming or making valid a voidable estate. A surrender was a conveyance of the estate in possession to one holding the estate in expectancy. It is the counterpart of the release. An assignment was a transfer to another of one's entire interest in the property. It was usually confined to estates for life or years. A defeasance is a collateral deed which provides conditions whereby the estate created by another deed may be defeated.

A covenant to stand seised to uses was a deed by which a man covenanted or agreed to hold the property to the use of some kinsman, in consideration of blood or marriage. This operated to vest the equitable estate in the relative and by the operation of the statute of uses the legal estate also vested. In a bargain and sale the grantor merely agreed with another that he would convey to him certain property. Courts of equity would then hold the covenanter to be a trustee for the other, and the legal title would also vest in him by the statute of uses. A lease and release did not depend for its effect upon the statute of uses, but was adopted soon after the passage of that statute. A lease of the property was made usually for one year, the lessor still holding the reversion. He then executed a release to the tenant in possession. Thus the complete title passed. A deed to declare the uses of other conveyances was, as its name implies, one specifying the use to which property conveyed by some other form of deed was to be held. A deed of revocation of uses was one used, when the power to

revoke the use had been reserved, in order to accomplish such revocation.

DEEDS IN THE UNITED STATES.

334. The forms of deed in use in the United States are of great variety, differing in the different States.

335. In addition to the common-law forms, there is in general use here a deed known as the "quitclaim" deed. This is a conveyance to another of whatever title the grantor may have at the time of the conveyance.

In this country most of the common-law deeds have been used, and many of them are still employed. The most usual common-law forms of deed here used are the feoffment, bargain and sale, and lease and release. In many States a statutory form of deed is prescribed; but this form does not necessarily supplant the old deeds. When a deed, of whatever form, conveys the title to the estate, with covenants of warranty of title, it is ordinarily referred to as a "warranty deed."

A quitclaim deed is similar to a common-law release, but it differs therefrom in this: that it is not restricted to the transfer of an expectant estate to the particular tenant, but is used to release any interest whatsoever which the grantor has; and the grantee may be, and usually is, a mere stranger to the estate. The quitclaim deed operates, therefore, as an original, rather than a derivative, conveyance. In fact, it is nothing more than a conveyance of the estate, without covenants of warranty.

CHAPTER XVII.

PERSONAL PROPERTY.

336–339. Chattels; Real and Personal.
340–342. Choses and Their Classification.
343–344. Corporeal and Incorporeal Personal Property.
345–346. The Ownership of Personal Property.
347–351. Titles to Personal Property and Their General Classification.
352–355. Title by Original Acquisition—Occupancy, Accession, and Creation.
356–359. Title by Operation of Law—Forfeiture, Succession, and Marriage.
360–363. Title by Legal Process—Prerogative, Execution, and Judicial Decree.
364. Title by Act of Parties.
365–368. Title by Gift.
369–369a. Title by Testament and by Contract.

CHATTELS; REAL AND PERSONAL.

336. The term "chattel" is a comprehensive one, including within its meaning every species of personal property, whether corporeal or incorporeal.

337. Chattels are divided into two classes:

(a) Chattels real, and

(b) Chattels personal.

338. A chattel real is an estate in real property less than freehold. It is also sometimes called a personal estate in real property.

339. Chattels personal include all forms of personal property except chattels real.

The word "chattel" is said by Blackstone to be derived from the Latin "catalla," meaning originally beasts of hus-

bandry.[1] But the Latin term was gradually enlarged in its signification until it included all movable property; and in this sense it has been adopted into our law.

The typical form of a chattel is a chattel personal. Such a chattel could not be held by tenure under the feudal system. It did not have the substantial character of real property. It was in early times the only form of personalty; but there gradually grew up a class of interests in realty which also lacked that characteristic permanence. These were the estates less than freehold. They did not come under the operation of the feudal rules relating to real property. While the property itself was permanent and substantial, these estates in it were not. The common law therefore assigned them to the class of chattels, and as they savored of the realty they were distinguished from all other personal property by the title "chattels real."

CHOSES AND THEIR CLASSIFICATION.

340. Chattels personal are also known as choses, and are divided into:

(a) Choses in possession, and

(b) Choses in action.

341. A chose in possession is one of which the owner has the present possession and enjoyment.

342. A chose in action was originally a piece of personal property which was out of the owner's possession, but which might be recovered by him in an action at law. The term is usually used at present, however, to mean, not the thing itself, but the right which the owner has to reduce it to possession. It has become synonymous with "right

[1] 2 Bl. Comm. 385.

of action." But it is sometimes used in its original sense.

If specific personal property, as a horse, is detained from the owner, he has a right to have its possession restored to him by law. In such a case it is plain that either meaning of the phrase "chose in action" would apply to it. We may consider it to be the thing itself which is detained, and which may be recovered, or the intangible right which the owner has to its possession. But there are other examples which present more difficulty. Thus let us suppose that money is due to a person; in which case that person is said to have a chose in action. But inasmuch as he is not entitled to any particular, specified coins or currency, it would be difficult for him to search out any specific chattel which he could claim as his own. The chose here consists, therefore, in the mere right to have money of a certain amount paid to him; and this right is incorporeal.

A still more obvious instance of the inapplicability of the original meaning of the phrase "chose in action" is found when an attempt is made to include within it the damages which may be recovered either for a breach of contract or for a tort. Here the chose must necessarily consist of the mere right, for not only is there no specific money to which the possessor of the chose can lay claim, but the damages are also ordinarily uncertain in amount. The generally accepted meaning of the term, then, is that which includes within it all those intangible rights to reduce something to possession, whether the thing itself be specific or otherwise.[2]

[2] Williams, Pers. Prop. p. 63. See, also, Schouler, Pers. Prop. p. 459.

CORPOREAL AND INCORPOREAL PERSONAL PROPERTY.

343. Personal property, like real property, may be classified into that which is corporeal and that which is incorporeal.

344. Incorporeal personal property includes chattels real, choses in action, and a number of intangible rights in possession which are not inheritable.

It is obvious that chattels real are incorporeal in their nature. The chattel real does not consist of the tangible property in which an estate less than freehold is held; for that is realty. It is rather the estate itself,—the intangible interest. A chose in action, being a mere right of action, is necessarily incorporeal.

There are a number of intangible rights, similar in many respects to the incorporeal forms of realty, which, however, not being inheritable, are personal property. Among the principal of these are: The right to a public office; the franchise; the pension; the rights of a stockholder in a corporation, incident to his share of the stock; patent rights; and copyrights.

THE OWNERSHIP OF PERSONAL PROPERTY.

345. The word "estate" properly has no application to personal property. Chattels are owned, not held of a superior. When, therefore, an estate therein is referred to, the term is used figuratively, in analogy to its use in connection with realty.

Instead, therefore, of speaking of estates in personal property, the term most in use in connection with the interest of the owner of such property is "ownership." It will be remembered that, during the existence of the feudal system, there were certain lands which did not come under its operation, but were held independently, or allodially. Personalty was held in a way practically identical to this allodial ownership of lands; and the distinction between the terms used to indicate the interest of the allodial proprietor and that of the owner of personalty on the one hand, and that of the holder or tenant of an estate on the other, is still retained.[3]

The interests which may be had in personalty, however, bear a considerable analogy to those which are held in real property. Thus:

346. The ownership of personal property may be:

(a) Present or expectant.

(b) Several, joint, or in common.

(c) For life, for years, or at will.

(d) Absolute or conditional.

The terms used to indicate the different kinds of ownership are the same as those applied to the different estates in real property; and their meaning when applied to personalty is not changed. While anciently the distinctions mentioned above were not recognized, as movable property grew in importance they gradually came to be observed. The expectant interest in personalty may be either in remainder or in reversion. If the ownership is joint, the right of survivorship exists, as in case of real property.

[3] Williams, Pers. Prop. p. 78; Schouler, Pers. Prop. p. 42.

TITLES TO PERSONAL PROPERTY AND THEIR GENERAL CLASSIFICATION.

347. In the law of personal property, as well as that of realty, the means by which the interest of the owner is held is called his title; and it may be acquired in either of four general ways:

(a) By original acquisition;

(b) By operation of law;

(c) By legal process; and

(d) By act of the parties.

348. Title by original acquisition is that title to personal property which is acquired either by the operation of natural causes or by the sole act of the person acquiring it.

349. Title by operation of law is that title to personal property which is acquired by the sole operation of legal principles.

350. Title by legal process is that which is acquired by virtue of the act of a court or public officer.

351. Title by act of the parties is that which is acquired by virtue of the concurrent acts of two successive owners of the property.

Title by original acquisition is that title which is in its nature original, either because there has been no previous title to the property, or because there has been a break in the chain of title; the owner in question, when he acquires his title to the property, thus starting a new chain. It will be seen later that this original title is the result either of an act of the party who acquires it or of natural causes.

Title by legal process is often classified under the head of title by operation of law, but it will be remembered that the two are distinct.

In acquiring title by act of the parties, it is necessary that the acts of two successive owners concur. It sometimes happens that the principal act is that of the prior owner, the act of his successor consisting merely of an acceptance of the title. In such cases, however, it is plain that the act of acceptance is as necessary to the transfer of the title as is the act of grant, for the law will not compel a person to hold property without his consent.

TITLE BY ORIGINAL ACQUISITION—OCCUPANCY, ACCESSION, AND CREATION.

352. Title by original acquisition is of three general kinds:

(a) Title by occupancy;

(b) Title by accession; and

(c) Title by creation.

353. Title by occupancy is the title which one may have to chattels which, previous to its acquisition, were without an owner.

354. Title by accession is the title which one acquires to whatever is produced by property already his own.

355. Title by creation is the title which is acquired, by one who first brings a thing into existence, to the thing created.

Title by occupancy is usually acquired either: (1) In animals feræ naturæ. So long as such animals remain untamed, there can be only a qualified title to them. They

may be captured and used, but if they regain their liberty all ownership in them is lost. (2) In things lost or abandoned by the previous owner. He who first assumes control over them takes a valid title. If they are lost, however, without abandonment, the finder acquires a qualified title merely, good as to all but the true owner; and, if the latter cannot be found, and he does not appear to claim his property within a reasonable time, he will be presumed to have abandoned it. (3) Goods lawfully captured in war. Such goods ordinarily vest in the government at the moment of the capture.

A common example of title by accession would be that to the young of animals or to the fruit of trees.

One may ordinarily acquire by creation the title to mechanical inventions and to literary products. Unless he surrenders his right to the results of his creation, no one has any legal power to infringe upon it. When, however, he puts the product on the market for sale or distribution, he is held to dedicate it to the public, unless it is made the object of patent or copyright. A patent is said by Chancellor Kent to be "a grant by the state of the exclusive privilege of making, using, and vending, and authorizing others to make, use, and vend, an invention." Following the general plan of this definition, it may be said that a copyright is a grant by the state of the exclusive right to multiply and dispose of, and to authorize others to multiply and dispose of, copies of a literary production.

TITLE BY OPERATION OF LAW—FORFEITURE, SUCCESSION, AND MARRIAGE.

356. The principal forms of title by operation of law are:

(a) Title by forfeiture;

(b) Title by succession; and

(c) Title by marriage.

357. Title by forfeiture is that title which is acquired to goods which the previous owner is obliged to give up as a penalty for some crime, tort, or breach of contract.

358. Title by succession is that title to property which is acquired either by the state or by an individual after the death of the previous owner.

359. Title by marriage is that which is acquired in personal property by virtue of the marriage relation.

For the punishment of crime, the fine is a method very frequently resorted to. The title which the state acquires by virtue of this and similar penalties is, of course, by forfeiture. Another example of this form of title exists where there has been a conditional sale of a chattel. Upon a breach of condition, the property reverts or is forfeited to the vendor.

Three forms of succession are often given by writers: (1) That of the government to the property of one who dies leaving no will, and no one capable of taking it; (2) that of the successive members of a corporation to the property of the corporation; and (3) that of the heirs or next of kin, or devisees or legatees, to the property of a deceased

person.[4] Of the second form, it is sufficient to remark that, under the American conception of a corporation, the property thereof does not at any time vest in the members who compose it, but in the corporation itself,—the intangible entity, which continues to exist, independent of the life of the members or stockholders. This phase of succession need not, therefore, be considered. The first and third forms may be classed together as succession after death, which will form the topic of the succeeding chapter.

Title by virtue of the marriage relation has been rendered to some extent obsolete by the Married Women's Acts, which have already been explained.

TITLE BY LEGAL PROCESS—PREROGATIVE, EXECUTION, AND JUDICIAL DECREE.

360. Title by legal process may be conveniently considered under three subdivisions:

(a) Title by prerogative;

(b) Title by execution; and

(c) Title by judicial decree.

361. Title by prerogative is that form of title to personal property which is acquired by the state in the exercise of its sovereign powers.

362. Title by execution is that title to property which is acquired when such property is sold to satisfy the judgment of a court of law.

363. Title by judicial decree is that which is acquired to property transferred by virtue of a decree of a court of equitable jurisdiction.

Title by prerogative is the counterpart of title by eminent domain. For example, the title which the government ac-

[4] Smith, Pers. Prop. p. 108.

quires in taxes collected for its support would be by prerogative. Of titles by execution and by judicial decree it is only necessary to say that they may be acquired to interests in personal property as well as to those in realty.

TITLE BY ACT OF PARTIES.

364. Title by act of parties is also of three principal kinds:

(a) Title by gift;

(b) Title by testament; and

(c) Title by contract.

SAME—TITLE BY GIFT.

365. Title by gift is that title which is acquired by virtue of a voluntary transfer of the property from the previous owner, without consideration.

366. Gifts are of two kinds:

(a) Gifts inter vivos; and

(b) Gifts causa mortis.

367. A gift inter vivos is one which is made irrespective of the death of the donor.

368. A gift causa mortis is one which is made at a time when the donor's death is imminent, and which is revoked by operation of law if he recovers.

A gift is a gratuitous transfer of personal property. Ordinarily this is made when both parties are living, and with no reference whatever to death. But when the donor is on his deathbed a gift then made is quite different in its legal effect from a gift inter vivos. It is, in a certain sense, a tes-

tamentary disposition of the property. It will revoke a previous will, so far as it is inconsistent therewith; but if the donor recover it is of no effect whatever.

Delivery is an essential element of every valid gift. A mere promise to give is of no legal effect.

SAME—TITLE BY TESTAMENT AND BY CONTRACT.

369. Title by testament is the title to personal property acquired at the death of the testator by virtue of his last will.

369a. Title by contract is the title which is acquired as the result of the performance of an agreement between successive owners of the property.

Title by testament will be considered in the following chapter. The nature of contracts is the subject discussed in chapter 19.

CHAPTER XVIII.

SUCCESSION AFTER DEATH.

370–373. Succession in General.
374–375. Testate Succession—Wills.
376–377. Intestate Succession—Descent and Distribution.
378. Escheat.
379–380. Executors and Administrators.

SUCCESSION IN GENERAL.

370. The law of succession is that branch of the substantive law which regulates the disposition of property after the death of the owner.

371. It is divided into two general divisions:

(a) The law of testate succession, and

(b) The law of intestate succession.

372. Testate succession is that form of succession which is governed by the last will of the deceased owner. When the owner has left a valid will, he is usually referred to as a "testator."

373. Intestate succession is that form of succession which, in the absence of a last will, is governed by legal rules of descent and distribution. The owner who has died without leaving a valid will is ordinarily called an "intestate."

It is supposed that in the most primitive times the conditions of holding property and of transmitting it to others were similar to those which exist among many of the savage tribes of the present day. There is in these tribes ordinarily no such thing as individual ownership in land; the

soil is held by the tribe, and hence the question of its transmission after death could with difficulty arise. With regard to personalty, such property was usually limited to the results of the hunt and the weapons which were used for hunting and for purposes of defense. The friends of a deceased owner of such property believed that, unless it could be conveyed in some way to him in the spirit land, he would lack the implements necessary for his eternal happiness. Hence, upon his death, the property was killed, or broken, to render its condition proper for admission to the happy hunting grounds. There was no attempt, probably, to secure such chattels to the representatives of the dead man.

The first step in the development of a law of succession was towards intestate succession. In the early times this took various forms. In some tribes the succession was through the female line; in others, through males. Among a certain race of South Australia, the rule is that, if a man dies without offspring, his personalty goes to the son of his brother. This is an illustration of the peculiar ideas which were once held as to the proper successor to the property of a deceased person. Except in the most savage races, however, there was always some provision for the disposition of property after death. The right to make a will was of later growth, although traces of it are found early in history. It does not usually exist except in civilized states. In Greece it was introduced by Solon, while in Rome it was recognized in the laws of the Twelve Tables.

While the feudal system was in operation, the allodial lands were inheritable, passing usually down through the male line. But the fiefs or feuds were originally, on the continent, held for life only. When they became inheritable, there was adopted what we know as the "right of primogeniture," which was a right on the part of the eldest son of the owner to succeed to that owner's feudal holdings.

The right of primogeniture has profoundly influenced the English law of succession, although it has affected the American law but little.

TESTATE SUCCESSION—WILLS.

374. A will is an instrument by which a person directs the succession of his property after his death. Until death it is subject to revocation by the person making it.

375. So far as the will relates to real property, it is called a "devise"; if it disposes of personalty, it is to that extent referred to as a "testament." The instrument itself is often called a "last will and testament."

In England the right to dispose of personal property by will is supposed to have existed from the earliest times. But it has not been an unlimited power; for, according to Blackstone and Glanvil, so late as the reign of Henry II., a man's goods were divided into three equal parts, one of which went to his lineal descendants, another to the wife, and the third was at his own disposal. As to the disposal of real property by will, it is supposed that the right existed to some extent before the Norman Conquest, but that, upon the introduction of the feudal system at that time, it was suspended until again revived by the Statute of Wills passed in 1543. Since that time various other statutes have been passed to regulate the subject of testate succession, the general effect of which has been to allow the testator practically the full control of the succession. In this country his right to regulate it is limited only by such antecedent rights as those of dower, curtesy, etc., and the rights of creditors.

INTESTATE SUCCESSION—DESCENT AND DISTRIBUTION.

376. "Descent," or "inheritance," is a term properly used only in reference to the succession of real property. The most approved term to indicate the succession of personal property is "distribution."

377. The descent and the distribution of property are governed in the States of the United States by statutes. In most States there exist two distinct statutes, one known as the "Statute of Descents" and the other as the "Statute of Distributions." Those who take realty under the Statute of Descents, as heirs, are often different from those who take personal property by distribution.

It is the theory of the law that the rules of descent and distribution make a disposition of the property which is what the average man would provide were he to make a will. It is his family which has the first claim upon him while living, and it is the family which is usually favored by the statutes relating to succession. Inasmuch, however, as the Statutes of Descent and of Distributions of the different States differ widely in their provisions, it would be impossible to present them in detail. In most States personalty does not go to the same set of successors as does real property. There are, however, a few States where the heir takes the chattels as well.

ESCHEAT.

378. If the owner of property dies intestate, and without lawful heirs or distributees, his property escheats to the state. In most of the States of the Union the proceeds of property which has thus escheated are dedicated to the cause of public education.

The rule of escheat is probably derived from the feudal system. If, under that system, a tenant received a grant to himself and his heirs, when neither he nor his heirs longer existed, the estate no longer existed, and the property reverted back to the lord of the fee. Under the old common law, therefore, the term "escheat" was applied properly only to real property. In this country the state stands in a position similar to that of the lord of the fee, taking, not by any feudal rule, but by virtue of its sovereignty, such property as has no other owner.

EXECUTORS AND ADMINISTRATORS.

379. An executor is one who is appointed by a testator in his last will to carry out the directions contained in that instrument.

380. An administrator is one who is appointed by a proper court to take charge of the property of a deceased person, and distribute it according to the will of the deceased or according to law.[1]

The appointment of an executor is one of the usual elements of a will. But if the deceased died intestate, or if,

[1] The term "personal representative" is a general one, indicating either an executor or an administrator.

in his will, no one is selected to settle the estate, or if the person selected declines to serve in such a capacity, it is the duty of the court which has jurisdiction over such matters to appoint an administrator. If there is a will, the administrator is guided by its directions. He is then called an "administrator with the will annexed." In the absence of a will, he finds his rules of action in the statutes. In either case, however, he is under the direct control of the court which has appointed him, and is instructed by such court in all matters of doubt.

The title to the real property of a deceased person vests, at the time of the death, in the heir or devisee. But the distributee or legatee does not have the title to the personalty vested in him until later. That title goes at once to the executor or administrator, who holds it in trust until the estate is closed, when it is passed over by him to those who are entitled to it.

CHAPTER XIX.

CONTRACTS.

381. Definition of Contract.
382–383. Agreement.
384. Requisites of Enforceability.
385. How Enforced.
386–389. Classification of Contracts.
390. Quasi Contract.

DEFINITION OF CONTRACT.

381. A contract is an agreement the fulfillment of whose promises is enforceable at law.

We have seen that every subject owes certain duties to the state, being obliged to obey the laws when those laws are properly laid down by competent governmental authority. The ground of this obligation is that such obedience is necessary to the fulfillment of the functions of the state, and therefore necessary to the welfare of society. By virtue of these obligations the subject is restricted in his freedom of action. He is obliged, for example, to pay taxes, and to refrain from the commission of crimes. The distinguishing feature of these restrictions is that they are imposed by law.

In addition to the restrictions thus imposed, the subject is able to bind himself by certain acts towards, or agreements with, his fellow subjects. If, for example, he should assault his neighbor, seriously injuring him, he might be obliged to compensate his neighbor therefor; and thus a relation similar to that of debtor and creditor would result, though of different origin. But if he should purchase

his neighbor's horse, and promise to pay for it on a certain day, the true relation of debtor and creditor would exist between them.

The subject may, therefore, be a party to two sorts of relations,—one resulting in a control exerted by the state over him, based upon the necessity of government in every community; the other involving a control exercised by him over one or more of his fellow subjects growing out of agreement (ex contractu) or out of wrongful act (ex delicto). The relations arising from the perpetration of wrongful acts towards other subjects, and the obligation arising therefrom, form the subject-matter of the law of torts, which will be discussed later. When two or more persons enter into a legal relation by agreement, the law will enforce the fulfillment of the promises involved in such agreement, and the agreement itself is called a contract.[1]

[1] The definitions of contract which are found in the books are various. Among the most celebrated are the following: Blackstone: "An agreement, upon sufficient consideration, to do or not to do a particular thing." 2 Bl. Comm. 442. Anson: "An agreement, enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others." Anson, Cont. 9. Parsons: "An agreement between two or more parties for the doing or the not doing of some particular thing." 1 Pars. Cont. 6. Justice Freedman: "The union of two or more minds in a thing done or to be done." Dietz v. Farish, 53 How. Pr. 221. Bishop: "A promise from one or more persons to another or others, either made in fact or created by the law, to do or refrain from some lawful thing; being also under the seal of the promisor, or being reduced to a judicial record, or being accompanied by a valid consideration, or being executed and not being in a form forbidden or declared inadequate by law." Bish. Cont. par. 22. Savigny: "The agreement of several persons in a concurrent declaration of intention, whereby their legal relations are determined." Sav. Hist. Rom. Law, § 140. Holland: "An expression of agreement, entered into by several, by which

It is obvious that there may be agreements the obligation of whose promises is of a moral or social nature merely; as when A. agrees to dine with his friend B. on a certain day. There are, on the other hand, rights which are enforceable at law, which do not originate in agreement, as those growing out of torts. But it is only when the two elements, agreement and enforceability at law, are both present that a contract exists.

AGREEMENT.

382. An agreement is the communication by two or more persons to each other, on the one hand of one or more promises to do or refrain from doing something, and on the other of a willingness to rely on the promises so made

383. The idea of an agreement involves

(a) Two or more parties naturally competent to enter into it;

(b) Mutual assent;

(c) Communication to each other of their mutual assent. And it is further necessary

(d) That the subject-matter with reference to which they agree shall be the doing or not doing of some act or acts. In other words, it must be something more than the concurrence in a mere abstract proposition.

rights in personam are created against one or more of them." Holl. Jur. 220. Pollock: "Every agreement and promise enforceable at law is a contract." Pol. Cont. 1.

Natural Competency of Parties.

It is sufficient for our purposes to refer the term "agreement" to the Latin phrase "aggregatio mentium," [2] or "meeting of the minds." As it would be impossible to conceive of such a meeting without the participation of at least two sane minds, it follows that no agreement can take place without two or more parties capable of giving an intelligent assent. It follows also that drunkenness, insanity, or any mental condition in which common intelligence is absent renders a person naturally incompetent to become a party to an agreement of any kind so long as the disability continues.

Mutual Assent.

The parties must not only be capable of an intelligent assent, but they must actually give their assent; and the assent of both must be to precisely the same thing, at the same instant of time. Consequently, if one consents to a certain thing, and the other assents to it only with modifications; or if one consents to it at one time and the other at a different time,—no agreement arises therefrom.

Communication.

There is, of course, no agreement until the mutual assent is communicated between the parties. While the assent of both parties must be at the same instant of time, it is not necessary that the communication should be simultaneous. This would be impracticable in most instances. As a rule, the law requires communications to be made by the two parties within a reasonable time of each other; and what is to be regarded as a reasonable time depends upon the circumstances of the particular case. Communication may be

[2] The word "agreement" is probably derived directly from the French "agreer," but the phrase "aggregatio mentium" expresses its meaning so exactly that it is referred to here.

either by written or spoken words, or by conduct; or partially by one and partially by the other.

Subject-Matter.

An agreement, in this sense, must refer to some act or acts to be performed by one or more of the parties. It must be concrete, not merely speculative. It must have a practical bearing on human action.

REQUISITES OF ENFORCEABILITY.

384. In order to render such an agreement enforceable at law, it must, in addition to these natural requisites, conform to certain legal requirements. The law enforces contracts in order to prevent disappointment of well-founded expectations, and, in order to insure that the expectation of the performance of a promise in an agreement is well founded, it insists—

(a) That the parties shall be legally competent to contract;

(b) That the promises be supported by consideration moving to the promisor, or be entered into by means of certain formalities;

(c) That the act promised be not impossible, illegal, or of evil tendency;

(d) That the subject-matter be of some money value; and

(e) That the agreement shall primarily affect the rights and duties of the parties thereto, rather than those of third persons.

Legal Competency of Parties.

The law requires, in addition to natural competency, that the parties possess certain other qualifications, in order that

their contract be binding upon them. For example, a person cannot make ordinary contracts until he is 21 years of age. Again, a married woman was, at common law, entirely without capacity to contract, and her right to do so is still somewhat limited. If any such incapacity exists in the parties, the law will not enforce their contract.

Consideration or Form.

Consideration consists of some benefit to the promisor, or detriment to the promisee, which forms the motive for the making of the promise. In order that an agreement be legally enforceable, its promises must be based upon a consideration which is of some value in the eye of the law, or it must have been entered into with the formalities of sealing, or judicial record. If no such formality or consideration is present, the agreement is referred to as a nudum pactum, or naked compact, and is of no legal validity.

Impossibility, Illegality, or Evil Tendency.

If the act promised is impossible of performance, the law presumes that there could be no reasonable expectation of its performance on the part of the promisee, and will not punish the promisor for the breach of his agreement. If it be illegal, as the law will not encourage any person in the violation of its own principles, such an agreement will not receive its sanction. Nor will one which, while not directly illegal, is yet opposed to the policy of the law, or to public policy.

Valuable Subject-Matter.

The subject-matter must be reducible to a money value; that is, the act promised must be worth something. If it cannot be so reduced, the benefit to be derived from it is so vague that the law will not interfere to preserve the promisee from disappointment. The value need not be large,

but it must be of a sufficient magnitude, and of such a nature that it can be measured by a money standard.

Effect.

It is plain that two persons cannot, by agreement between themselves, impose contractual obligations upon a third person, who is not a party to the transaction. It is therefore one of the elements of a legal contract that the promises impose liability only upon the parties who make them. Third persons cannot be forced into the contractual relation without their consent.

HOW ENFORCED.

385. The law enforces the provisions of the contract either—

(a) By compelling specific performance of its promises, or

(b) By awarding damages for its breach to be paid by the party in fault to the party injured thereby.

By "specific performance of a contract" is meant the compelling a party to do what he has promised to do in his agreement. The awarding of damages for the breach of a contract is the most usual method of enforcing it, specific performance being resorted to only in those cases where the mere payment of damages is not deemed an adequate remedy. The granting of specific performance is one of the leading subjects of equity jurisdiction.

CLASSIFICATION OF CONTRACTS.

386. There are three different classifications of contracts recognized by the courts,—the first based upon the character of the promises as to time of

performance, whether present or future; the second having for its basis the form in which the contract is expressed; and the third depending upon the mode of proof.

387. As to the present or future performance of their promises, contracts are either executed or executory. An executed contract is one whose promises are wholly performed. An executory contract is one where something yet remains to be done. If one party has fulfilled his promise, while the other has not, the contract is said to be executed as to one and executory as to the other.

It must be admitted that the terms "executed" and "executory" are used by some legal writers in relation to contract in senses different from those stated above. The better authorities, however, seem to regard an executed contract as one whose promises are wholly performed on both sides.[3] Strictly speaking, such a transaction would not be a contract, as it involves no outstanding obligation, and therefore its promises can hardly be said to be enforceable at law; but in legal theory there must have been such obligations at some time, though perhaps of merely momentary duration, and the definition is thus upheld.

388. As to form, contracts are divided into contracts of record, specialties, and parol contracts.

[3] This is the view taken by Mr. Bishop and by the writer on "Contracts" in the American and English Encyclopedia of Law: "Executed contracts are not properly contracts at all. The term is used to signify rights in property which have been acquired by means of contract. The parties are no longer bound by a contractual tie." 3 Am. & Eng. Enc. Law, 824. For another view, see Anson, Cont. p. 13, note.

"Contracts of record" is the name applied to a class of obligations which are made and entered in the records of a court. A specialty, or deed, is a contract under seal. A parol or simple contract is one which is neither under seal nor of record, but is informal in its character.

In some contracts of record, as in recognizances,[4] the element of agreement is usually present. In others, as judgments, it is almost invariably absent, and therefore the term "contract," as applied to them, is a misnomer. This usage of the term is so frequent, however, that it cannot be ignored.[5] A specialty is said to be the only true formal contract of the common law, it deriving its validity from the seal alone. It has long been settled that there is no such distinct class of contracts as "contracts in writing." All contracts not under seal or of record are parol contracts, whether oral or written.[6] The writing is merely useful as definitely proving the terms of the agreement. Consideration is a necessary element of every parol contract. Without it, such a contract is of no validity.

389. As to their mode of proof, contracts are divided into express contracts and implied contracts. An express contract is one in which the terms of the agreement are communicated openly, by language or its equivalent. An implied con-

[4] A recognizance is defined as "an obligation of record which a man enters into before some court of record or magistrate duly authorized, with condition to do some particular act." 2 Tidd, Prac. 1131. The most common example of this kind of obligation is what is known as "bail" in criminal cases.

[5] See Rae v. Hulbert, 17 Ill. 572; Morse v. Tappen, 3 Gray, 411. Judgments come more properly under the head of "Quasi Contracts."

[6] See Rann v. Hughes, 7 Term. R. 350, note.

tract is one where there is no open and direct communication of assent, but assent is presumed from the circumstances of the case.

"The only difference between an express and an implied contract," said Parke, B., in the case of Manzetti v. Williams,[7] "is in the mode of proof. An express contract is proved by direct evidence; an implied contract by circumstantial evidence. Whether the contract be proved by evidence direct or circumstantial, the consequences resulting must be the same."

QUASI CONTRACT.

390. Quasi contract, or contract implied in the law, denotes a relation in which an obligation analogous to that of contract is imposed, without agreement, to meet the natural justice of the case.

Perhaps the most common example of this kind of obligation is the case where one person has, by mistake or otherwise, paid money which another should have paid. The law will compel the latter to refund to the former the amount so expended. The remedy being the same as if there had been an actual agreement to refund, the obligation is termed "quasi ex contractu," or "in the nature of contract."

[7] 1 Barn. & Adol. 415.

CHAPTER XX.

SPECIAL CONTRACTS.

391–392. Contracts of Sale—Their Nature and Requisites.
393–394. The Statute of Frauds.
395–396. Executory and Executed.
397–398. Bailments—Their General Nature.
399–400. Classification.
401. Liability of the Bailee.
402–405. Exceptional Bailees.
406. Innkeepers and Common Carriers.
407–408. Negotiable Contracts.
409–411. Bills of Exchange.
412–413. Promissory Notes.
414. Words of Negotiability.
415–416. Methods of Transfer.
417–418. Contract of Suretyship.
419. The Statute of Frauds.
420. Discharge of the Surety.
421. Indemnity.
422–424. Contract of Insurance
425. Insurable Interest.

CONTRACTS OF SALE—THEIR NATURE AND REQUISITES.

391. A contract of sale is an agreement to transfer the title to a chattel in consideration of a price in money.

392. To a valid contract of sale, there are four requisites:

(a) Parties competent to contract.

(b) Mutual assent.

(c) A chattel to be sold.

(d) A price.

The subjects respecting which contracts may be made are almost infinite in their variety, and the general principles of the law relating to them are sometimes modified to meet the requirements of a peculiar subject-matter. Hence it becomes necessary to consider certain special classes of contracts which, from peculiarities in the matters to which they relate, are governed by special rules not applicable to contracts in general. Of these, the most important are the contract of sale, the contract of bailment, the negotiable contract, the contract of insurance, and the contract of suretyship.

The requirement of competent parties and of mutual assent applies to contracts of sale to the same extent as to contracts in general. The peculiarity of this contract is that it has for its object the transfer of the title to a chattel from one to another, and that this transfer be in consideration of money. It is therefore distinguished from a contract of exchange, which is based upon a consideration other than money.

SAME—THE STATUTE OF FRAUDS.

393. The English Statute of Frauds was passed in the twenty-ninth year of the reign of Charles II. (1677). Sections 4 and 17 of this statute have been adopted in the majority of the American States.

394. Section 17 of the Statute of Frauds enacts that "no contract for the sale of any goods, wares and merchandises for the price of £10 sterling or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same; or give something in earnest to bind the bargain or in part payment; or

that some note or memorandum of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto authorized."

The effect of this statute on contracts of sale which do not comply with its terms is to make them unenforceable in the courts. It does not stamp them as illegal, but merely withdraws the legal remedies which might otherwise be resorted to.

This section of the Statute of Frauds applies only to contracts of sale where the thing to be sold is of the price of £10 or more. In this country the amount mentioned as the minimum ranges from $30 to $300, but is usually placed at $50.

There may be an oral as well as a written compliance with this section. A writing is required only when there has been neither a partial delivery and acceptance of the thing sold, on the one hand, nor a part payment of the price, on the other.

SAME—EXECUTORY AND EXECUTED.

395. Contracts of sale may be either executed or executory. An executed contract of sale, or an actual sale, is one where the title to the chattel has passed. An executory contract of sale is one by which it is agreed that the title shall pass at some future time.

396. Whether the title has passed or not depends upon the intention of the parties. The delivery of the property from seller to buyer is not a conclusive test.

It sometimes becomes important to determine the exact time when the title passes. Suppose, for example, the

property has been delivered to the buyer, and is destroyed by fire or accident while it is in his possession. If the title has passed, the loss is his; if not, it is that of the seller. Again, the title may pass although the goods are still in the custody of the seller. If they are destroyed after the passage of the title, the loss falls upon the purchaser, although they have never been delivered to him.

BAILMENTS—THEIR GENERAL NATURE.

397. A bailment is a delivery of personal property for a particular purpose, accompanied by a contract, express or implied, by which the terms and conditions of the delivery are specified.

398. A bailment is distinguished from a sale by the fact that in case of the former the title remains in the bailor, while in a sale it passes to the purchaser.

A bailment is often defined to be a delivery of personal property without the passage of the title; and this is, for practical purposes, a good definition. In all true bailments, however, there is not only a delivery, but also a contractual arrangement which regulates the rights and duties of the parties. Thus, if A. delivers his watch to B., a jeweler, to be repaired, there is a contract, usually expressed, by which B. agrees to repair the watch, and keep it safely, and return it to A. when called for; while A., on his part, agrees to pay for the service a certain sum. This is an example of a typical bailment. It is sometimes said that an accompanying contract is not always necessary; and the case is cited of one who has goods placed in his carriage without his knowledge, and drives away with them. Here is a delivery, but certainly no agreement to

assume any bailment responsibility; yet the law will treat the one who thus has the custody of goods thrust upon him as under a certain liability for their safe-keeping. This liability is by virtue of a quasi contract, and it would seem more proper to refer to the delivery in such a case as a quasi bailment, because the true contractual element which has long been regarded as the essential to a bailment proper does not exist.

SAME—CLASSIFICATION.

399. The leading forms of bailment at the common law were:

(a) Depositum, or a deposit of goods with another for safe-keeping without recompense.

(b) Commodatum, or a gratuitous loan.

(c) Mandatum, or bailment for the purpose of some gratuitous service upon the chattel.

(d) Pignus, or pawn; the delivery of a chattel to be held as security for a debt.

(e) Locatio; including

(1) A loan for hire, and

(2) A delivery for the purpose of having some service performed upon the chattel by the bailee, for which he is to be compensated.

400. A more modern classification of bailments is that which divides them into:

(a) Bailments for the exclusive benefit of the bailor;

(b) Those for the exclusive benefit of the bailee; and

(c) Those for the benefit of both parties.

The common-law classification was merely an enumeration of some of the leading forms of bailment. It was based upon no particular principle of classification. It was adopted from the Roman law. It was later seen that a more practical division of bailments was to be found, based upon the principle of the benefit which the parties derive from the transaction. Such a classification is useful because it measures the liability of the bailee for injuries to the goods. For—

SAME—LIABILITY OF THE BAILEE.

401. It is a general principle of the law of bailments that the liability of the bailee for injuries to the goods which he holds is dependent upon the benefit which the respective parties derive from the bailment; that is:

(a) Where the bailment is for the exclusive benefit of the bailor, the bailee is liable only for the results of gross negligence.

(b) Where it is for the benefit of both parties, he is liable for ordinary negligence.

(c) Where it is for the bailee's exclusive benefit, he is liable even for slight negligence.

It is difficult to define these three different degrees of negligence. What is gross negligence depends very largely upon the surrounding circumstances. The same act might under different circumstances constitute any of the three different degrees. Ordinary negligence is the absence of that degree of care which an ordinarily prudent man would exercise under the circumstances. Slight negligence is less in degree than this, while gross negligence is greater.

SAME—EXCEPTIONAL BAILEES.

402. There are certain extraordinary bailments to which these general rules of liability do not apply. The most important of these are those incident to the vocations of the innkeeper and the common carrier.

403. An innkeeper is a person who undertakes to provide lodging and necessaries for all travelers who may require such entertainment, and are able and willing to pay therefor.

404. A guest is a traveler who receives accommodations at an inn.

An innkeeper should be distinguished from a mere boarding-house keeper. The difference between the two is stated in a leading case to be as follows: "In a boarding house the guest is under an express contract, at a certain rate, for a certain period of time. But in an inn there is no express engagement; the guest, being on his way, is entertained from day to day, according to his business, upon an implied contract." The keeper of a boarding house may accept or refuse one who applies for entertainment; but the innkeeper, holding himself out as ready to accommodate the public generally, must receive all who ask for entertainment, provided they conduct themselves properly, and are able and willing to pay for their accommodations.

The relation of innkeeper and guest exists between the proprietor of the inn and transients who receive the accommodations of the house. An inn may, and usually does, have boarders who have entered into an express contract for accommodations for a greater or less time; but it is only for the benefit of the transient customers—the "guests,"

properly so called—that the extraordinary bailment liabilities of the innkeeper are imposed.

405. A common carrier is a person who undertakes to transport from one place to another the goods of all persons who may choose to employ him for that purpose.

In order to constitute himself a common carrier, it is not necessary that the person hold himself out as willing to receive and transport all species of goods. He may restrict his offer to certain kinds; but, having once assumed the business of common carrier, he is obliged to carry for all persons indiscriminately.

Carriers of goods may be either private carriers or common carriers. A private carrier is one who carries under special contract, without holding himself out to the world as ready to carry the goods of all who present their goods for transportation. The liability of private carriers for injuries to goods intrusted to them is governed by the general bailment law; but common carriers subject themselves to an extraordinary liability.

SAME—INNKEEPERS AND COMMON CARRIERS.

406. By the weight of authority, innkeepers and common carriers are each liable, as insurers, for any loss or injury to property intrusted to their care which is not caused by

(a) The act of God;

(b) The public enemy; or

(c) The act or negligence of the owner himself.

The reason of the extraordinary liability imposed upon persons engaged in these vocations grows out of the public

nature of the employment. It is well known that in early times the continental inns were frequently resorted to by banditti for purposes of plunder, and the hosts were often found to be in league with the robbers. No transient guest was secure in his person or property. The condition of affairs in England was much different, because of this salutary provision of the common law, which made the keeper of such a house responsible for the safety of the goods of his guest. It became his interest not to rob, but to protect, the wayfarer who came to partake of his hospitality.

The law also recognized that there was a peculiar temptation incident to the carrier's employment. Obliged to pass through lonely ways, which were often infested with highwaymen, the pursuit of his calling would often be dangerous if he did not have an understanding with the robber class. The inducements to collude were strong, and the opportunity to do so without detection was great. Public policy seemed to demand that the carrier should assume liability as an insurer of the safety of the goods.

NEGOTIABLE CONTRACTS.

407. A negotiable contract is one the rights under which may be so transferred, by the delivery or indorsement of the writing by which they are evidenced, as to enable the transferee to sue in his own name, subject to no equities between prior parties.

408. The writing by which such a contract is evidenced is called a "negotiable instrument." The principal kinds of negotiable instruments are bills of exchange, promissory notes, and checks.

It was a rule of the common law that choses in action could not be assigned. Courts of equity, however, would

allow an assignment to be made subject to certain conditions. They would uphold an assignment made upon sufficient consideration when proper notice of such assignment had been given to the person against whom the right was to be enforced. But the assignee took the chose subject to all defenses which might have been introduced against the assignor. In other words, he took it subject to the "equities" between the original parties. By statutes in England and in this country, choses in action are now made assignable at law, subject to substantially the same restrictions which prevail in the equity courts.

But from time immemorial there was an exception to the common-law rule preventing such an assignment. This was in the case of bills of exchange, which might be so drawn as to be capable of passing from hand to hand by mere indorsement or delivery. And, by the statute of 3 & 4 Anne, promissory notes were also made capable of being so transferred. These bills and notes were not only exceptions to the common-law rule forbidding assignment, but to the equitable and statutory rules as well; for not only could they be assigned, but if the assignee was a bona fide holder for value, and without notice of the equities between the original parties, he took the instrument free from such equities. In other words, he took the rights which the instrument, on its face, purported to give him. This peculiar quality of bills and notes, which at present applies also to checks, distinguishes them from instruments which are merely assignable. The quality itself is called "negotiability."

SAME—BILLS OF EXCHANGE.

409. A bill of exchange or a draft is an unconditional order for the payment of a certain sum of money at a specified time.

410. The person making the order is called the "drawer"; the person to whom it is made, the "drawee"; and the person to whom the money is ordered paid, the "payee."

411. The payee has no rights as such against the drawee until the bill has been accepted by the latter. By accepting the bill, the drawee promises to pay it according to its terms. After acceptance, the drawee is called the "acceptor."

A mere order on another for the payment of money does not, of course, have the effect of binding that other, for one man cannot impose contractual liability upon another without that other's consent. The order amounts merely to an offer, and an acceptance is necessary before any contractual rights arise. When accepted, however, there is a complete contract.

The ordinary form of a bill of exchange is:

"Boston, Jan. 2, 1896.

"At sight, pay to A. B., or order, one thousand dollars, value received, and charge to the account of C. D.

"To the First National Bank of Chicago, Ill."

The bill is usually accepted by the acceptor writing the word "Accepted," with his signature, on the instrument.

SAME—PROMISSORY NOTES.

412. A promissory note is an unconditional written promise to pay a certain sum of money at a specified time.

413. The person making the promise is usually referred to as the "maker"; the one to whom the promise is made is called the "payee."

The form of a promissory note is usually as follows:

"Cleveland, Ohio, Jan. 2, 1896.

"One year from date, for value received, I promise to pay to A. B., or order, one hundred dollars, at the First National Bank of Cleveland. C. D."

SAME—WORDS OF NEGOTIABILITY.

414. In order that a bill or note be negotiable, it must contain on its face words of negotiability.

Bills and notes are either negotiable or nonnegotiable. Negotiability is indicated by making the note or bill payable to order or to bearer. Thus, if it is payable to "A. or order," to "A. or bearer," "to the order of A.," or merely "to bearer," it is negotiable, but not so if it is merely payable to "A."

SAME—METHODS OF TRANSFER.

415. A bill or note payable to bearer is transferable by mere delivery. An instrument payable to order requires indorsement for its transfer.

416. By indorsement is meant the transfer of a negotiable instrument by some writing on the instrument itself. Indorsement must be accompanied by the delivery of the instrument in order to work a valid transfer thereof.

Indorsement may be either in blank or special. An indorsement in blank is usually effected by the indorser's writing his name upon the back of the bill or note. The result of a blank indorsement is to make the instrument transferable by mere delivery. A special indorsement is

one which directs payment to a particular person or his order; e. g.: "Pay to the order of G. H. [Signed] A. B."

CONTRACT OF SURETYSHIP.

417. A contract of suretyship is a contract by which one person becomes responsible for the debt, default, or miscarriage of another.

418. Tho one who thus becomes responsible for another's default is called a "surety"; the one for whose default he becomes responsible is referred to as the "principal."

The terms "suretyship" and "guaranty," though often used as synonymous with each other, are not to be used indiscriminately. A surety is one who becomes responsible for the default of another at the same time when the principal becomes bound, in view of the same consideration, and, when the contract is reduced to writing, by the same instrument. The guarantor, however, becomes such at a different time from that when his principal is bound, by a different instrument, and often upon a separate consideration. The principal and surety are bound on the same contract, while the guarantor's obligation is purely collateral. A typical example of a contract of suretyship is found in an ordinary bond, by which both principal and sureties are "held and firmly bound" jointly to the obligee.

SAME—THE STATUTE OF FRAUDS.

419. The fourth section of the Statute of Frauds provides that "no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own

estate; or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; or to charge any person upon any agreement made in consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized." Consequently, the contract of suretyship must be in writing, in order to be valid.

The words "any special promise to answer for the debt, default or miscarriage of another person" obviously include contracts of guaranty as well as contracts of suretyship.

SAME—DISCHARGE OF THE SURETY.

420. As a general rule, any act on the part of the creditor which discharges the principal debtor discharges the surety; and the latter is also discharged by any material alteration in the terms of the original liability without his consent.

Thus, if the time of payment is extended for a definite period after payment is due, without the surety's consent, he is discharged. As it has been expressed: "The obligor and the obligee are bound to know that, if they find it convenient to change or vary the terms of the original contract, they must seek the assent of the surety, because it is his

contract as well as theirs; and, if they will not do so, they take upon themselves the hazard, and thus loosen the bonds of the surety."

SAME—INDEMNITY.

421. If the principal fails to meet his obligation, and the surety pays it or any part of it, the latter may recover from the former the amount so expended in his behalf.

The liability of the principal to reimburse the surety for money expended by reason of his default is quasi contractual. In the absence of an express contract to indemnify, the law will create a liability to do so, even though the principal protest against such liability.

CONTRACT OF INSURANCE.

422. A contract of insurance is one whereby one person undertakes to compensate another if that other shall suffer loss.

423. If the contract of insurance is reduced to writing, the instrument by which it is evidenced is called a "policy."

424. Contracts of insurance are of different kinds, according to the nature of the loss against which a person is insured. The most common kinds of insurance are:

(a) Fire insurance;

(b) Marine insurance;

(c) Accident insurance; and

(d) Life insurance.

Perhaps no valid distinction can be drawn between the contract of insurance and the ordinary wagering contract. The law has, in recent years, condemned the ordinary wager, on the ground that it is demoralizing in its tendencies, but has always upheld insurance against loss as an exception to its sweeping rule which refuses to enforce gambling transactions. The contract of insurance is a contract of indemnity, and seems to be a necessity in the modern commercial world. A learned writer has said: "It is the most enlightened and benevolent form which the projects of self-interest ever took. It is in fact, in a limited sense and a practicable method, the agreement of a community to consider the goods of its individual members as common. It is an agreement that those whose fortune it shall be to have more than average success shall resign the surplus in favor of those who have less." It is an agreement that those who have more than the average of misfortune shall, for a consideration, be relieved from the results thereof.

It is customary, though not absolutely necessary, to reduce the contract of insurance to the form of a policy. Fire insurance indemnifies against the results of fire; marine insurance against the perils of the sea; accident insurance against unforeseen injuries; and life insurance against premature death.

SAME—INSURABLE INTEREST.

425. The subject-matter of the insurance must be something in which the person who seeks insurance has an interest.

If one wishes to have his property insured against fire, he may do so; but he would not be allowed to insure another's property, in which he had no interest, because of the temp-

tation in which he would be placed to destroy the property in order to secure the amount of the insurance money. In other words, he cannot be insured against that which is no loss to him. The same principle holds true in all forms of insurance.

CHAPTER XXI.

AGENCY.

426. The Relation in General.
427–428. The Parties to the Relation.
429. Unlawful Agencies.
430. The Creation of the Relation.
431–432. Ratification.
433. Termination of the Relation.

THE RELATION IN GENERAL.

426. Agency is a relation existing where one person has authority to represent another in business transactions. A person who so represents another is called an "agent"; the one whom he represents is known as the "principal."

The complexity of modern business life makes it impossible for men to perform all necessary commercial functions in person. One who is the proprietor of a large business establishment must obviously confine his personal attention to a comparatively few of its most important concerns, while the vast number of minor details must be attended to by subordinates. Again, one person may have business interests which demand his attention at the same time in places widely removed from each other, in which case the services of an agent must, of course, be had. Furthermore, corporations, which exist only in contemplation of law, must necessarily act through agents. As the commercial intercourse of our country expands, agency, in its various forms, tends to become a more and more important topic of the law.

It is, however, not only in business transactions, but also

in merely mechanical matters, that there is a necessity for utilizing the services of others. But one who is employed to perform acts purely ministerial is not called an "agent," but is a "servant." There is a close similarity between the relations of master and servant and of principal and agent. It is usually held that the true distinction between them is that agency involves the use of more or less discretionary power in the agent, while service is a relation in which the servant is bound to obey in detail all the lawful commands of the master, being constantly under the latter's control.

While agency is thus distinguished from the relation of master and servant, it is also necessary to distinguish it from the relation existing where one person undertakes to perform a certain work for another as an independent contractor. The servant has practically no discretionary powers, while the independent contractor has full discretion except so far as he has limited himself by the terms of his contract. The agent stands midway between the two. While he has a certain degree of discretion, he is also subject, to a certain extent, to the control of his principal. An illustration will make these distinctions clear. Let us suppose that Mr. A. wishes to build a house. Two courses are open to him: He may take charge of the work himself, buying the materials, and employing the workmen; or he may enter into a contract with a person who is accustomed to build houses for others, in which that person agrees to bring into existence a house according to the specified plans. This person is an independent contractor, for he merely undertakes to produce a completed result. He is not subject to the directions of Mr. A. Let us suppose, further, that the independent contractor finds it necessary to purchase material for such a house at a distant place. If it is not convenient for him to make this purchase in person, he will naturally delegate authority to make it to another;

and as such a mission must necessarily involve a certain amount of discretion, both as to the selection of the material and as to the determination of the price, the person undertaking it is an agent. The independent contractor, having secured his material, employs masons, carpenters, etc., who are, of course, merely servants.

THE PARTIES TO THE RELATION.

427. It is a general rule that any person may be a principal in a particular transaction who is capable of executing the transaction himself.

428. Any person may be an agent except an insane person and a child of tender years.

Thus, an infant may do any act through an agent which he is capable of doing in his own person, his capacity, however, being very limited; for, as has been seen, he is not allowed to bind himself except for necessaries. A married woman may contract through an agent so far as she has been made capable of personally contracting by the married women's acts. A partnership may be a principal, while a corporation, having no substantive existence, must necessarily act through agents.

It requires much less capacity to act as agent than to act as principal. All persons who are capable of acting in their own right are also capable of becoming agents, but the law does not recognize any reason for denying the capacity of persons to act as agents except for obvious mental deficiencies. An infant, therefore, although he may not be able to enter into valid contracts on his own behalf, may represent another successfully. But, if he is so young as to be incapable of appreciating the duties of such a relation, the law will not permit him to so act. Idiocy, lunacy, or any other form of insanity will also be a disqualification.

UNLAWFUL AGENCIES.

429. An agent can not be appointed to do any act

(a) Which is immoral, illegal, or against public policy; or

(b) Which, from its nature, requires personal performance.

Agency may be created for any lawful purpose, but it is plain that the law will not sanction the establishment of a relation whose very object is to violate legal principles. But, in order to make the relation illegal, it is not always necessary that anything actually in violation of the law be contemplated at the time of its creation. It is sufficient if its object is of such a nature that its natural tendency would be towards a violation of the law. Such an agency would be against public policy; and not only do the courts discountenance attempts which will result in the subversion of the laws or policy of the community, but they will also decline to enforce the duties incident to the relation of agency when that relation is established for a clearly immoral purpose.

There are certain acts the performance of which cannot be delegated to an agent. For example, a man may not be married through a proxy. Nor can one delegate discretionary powers to make a will. So, also, a man may not, as a rule, authorize an agent to vote for him. In general, it may be stated that wherever a person has conferred upon him power to do an act, and such power is given by reason of some special fitness on his part, the act must be performed by him personally, and cannot be delegated by him to another person.

THE CREATION OF THE RELATION.

430. The relation may be created:

(a) Expressly.

(1) By sealed instrument.

(2) By written unsealed instrument.

(3) Orally.

(b) Impliedly.

(c) By law.

(d) By estoppel.

It is laid down as a general rule, to which, however, there are important exceptions, that an agent cannot be appointed except by the will of the principal. This will may be expressed, or implied from the principal's actions. It may be expressed in a formal way by an instrument under seal. Such an instrument is necessary in order to give the agent authority to execute an instrument under seal. When the relation is thus formally created, the instrument creating it is called a "power of attorney." The agency may be created also in most cases by a written instrument or by word of mouth.

In many cases, however, the law will presume from the acts of the principal that the agent has authority to act for him, though he has not given such agent any express authority.

Agency may also be established by operation of law. Thus, it has been seen that a wife has power to act as the agent of her husband in the purchase of necessaries, when he has not supplied them, even though he may expressly protest against such an exercise of authority.

The doctrine of estoppel is one which pervades largely the whole legal system. It is said by Mr. Parsons that "an estoppel is an admission or a declaration which the law

does not permit him who has made it to deny or disprove for his own benefit, and to the injury of another." "It is called an estoppel or a conclusion," says Lord Coke, "because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth." The application of this doctrine to the creation of an agency is plain. Whenever a person has held out another, or has allowed such other to be held out, as his agent, the law will not permit him to deny the relation when an innocent third person seeks to hold him responsible as principal.

RATIFICATION.

431. Ratification is the adoption of the unauthorized act of one assuming to act as agent, by the person or persons for whom the act was alleged to have been done.

432. The general result of ratification is to place the act ratified in the same position as if it had been previously authorized.

In order that there may be a valid ratification, it is necessary (1) that the one assuming to do the act claim to represent the person ratifying; (2) that the person ratifying have the present ability to do the act; and (3) that he have knowledge of all the material facts which he cares to have. If the principal ratifies the act, he must adopt its liabilities as well as its advantages. There can be no ratification of part of an act.

As a result of the ratification, the principal becomes bound as though he had done the act himself, or had given previous authority to do it. As to whether the principal can hold the third person against the latter's will, by ratification of a previously unauthorized act, there is a conflict of authority.

TERMINATION OF THE RELATION.

433. The relation of agency may be brought to an end in one of three general ways:

(a) By the expiration of the time, or the completion of the business, for which it was created;

(b) By the act of the parties; and

(c) By operation of law.

If the agent is hired to represent a principal in his business for a definite period of time, at the expiration of that time the agent's authority would cease; and, if he was appointed to perform a particular act, the moment that act was performed his agency would terminate.

The termination of the relation by act of the parties may be either by the revocation of the agent's authority by the principal or the renunciation of his agency by the agent. As a rule, such revocation or renunciation is within the power of the parties at any time; but if, by taking such a step, the party violates the contract by which the relation was formed, he will be liable for any loss which may be occasioned to the other party by such violation.

Agency may be brought to an end by operation of law in various ways. Thus, the death of one of the parties, the insanity of one of the parties, the bankruptcy of one of the parties, the marriage of one of the parties in certain cases, will have that effect.

CHAPTER XXII.

COMMERCIAL ASSOCIATIONS.

434. Partnerships—Their General Nature.
435–436. Rights and Liabilities of Partners.
437. How Formed—Partnership by Estoppel.
438. Mutual Agency.
439–440. Limited Partnerships.
441. Partnership Associations Limited.
442–443. Voluntary Associations.
444. Joint-Stock Companies.
445–446. Corporations—Public and Private.
447. How Created.
448. Board of Directors.
449. Rights of Stockholders.
450. Liabilities of Stockholders.
451. Limitations of Existence.

PARTNERSHIPS—THEIR GENERAL NATURE.

434. A partnership or firm is an association founded upon the contract of two or more persons to combine property, labor, or skill in business as principals for the purpose of joint profit.

It frequently happens that, for the conduct of a business enterprise, more capital is necessary than is possessed by the individual who wishes to engage in that enterprise. There thus arises a necessity for the combination of capital belonging to two or more persons. Various forms of association for business purposes thus arise, differing from each other according to the different forms of agreement into which the parties who thus combine their resources enter. The most ancient and usual form of association is the partnership.

SAME—RIGHTS AND LIABILITIES OF PARTNERS.

435. Every member of a firm, unless restricted by the terms of the partnership articles, is entitled, jointly with his copartners, to the full control of the partnership property and of the partnership business.

436. Every member of a firm is personally liable for all the partnership debts.

When two or more persons enter into a partnership relation, the law imposes upon them certain peculiar liabilities and rights which are not necessarily mentioned in the agreement by which the association is formed. In their relations to the partnership property, the law proceeds upon the theory that theirs is in the nature of a joint ownership. One partner cannot, therefore, deprive his copartner of any element of the free control over the firm property which one joint owner is entitled to. Furthermore, one partner has a right to control the partnership business. Both partners are principals. Each is entitled to control the entire partnership affairs. If, in the exercise of such control, partners cannot agree, the only remedy is a dissolution of the firm.

As the correlative of this complete control of the partnership affairs vested in each partner, the law imposes upon each member of the partnership complete liability for all the partnership debts. He may be compelled to pay them not merely to the extent of the amount which he has contributed to the capital, not merely his share of them, but all of them to the same extent as though they were his individual debts.

SAME — HOW FORMED — PARTNERSHIP BY ESTOPPEL.

437. A true partnership can be formed only by the contract of its members. But one who is not in reality a partner may be held liable to third persons as a member of the firm, if he so conducts himself as to lead such third persons to believe that he is a partner, and to rely upon his responsibility. He is then said to be a partner by estoppel.

The doctrine of estoppel has been explained in a previous chapter. Its application here will be readily appreciated. The liability of a partner for the partnership debts is somewhat extraordinary. Persons dealing with a firm have a right to rely upon the personal responsibility of every member of the partnership. In many cases a particular partner is the only member of the firm who has property which may be levied upon in case the firm fails to meet its obligations. It is to him, then, that business men will look for the payment of the partnership debts. But, although a person of this description is not actually a member of the firm, having entered into no contract of copartnership, contributed no capital, and having no control over the partnership affairs, if he so conducts himself as to lead a person dealing with the firm to believe that he is a partner, and such person is induced to give credit to the firm by his reliance upon this particular person's responsibility, that person will not afterwards be heard to deny the responsibility which he has, by his own acts or negligence, assumed.

Although such a person may thus stand in the position of a partner as to third persons, he does not, by his assuming this responsibility, actually become a member of the firm. A partnership is invariably based upon the contract of the

partners, and a man cannot, by estoppel, assume any of the rights which a true member of the firm might have.

SAME—MUTUAL AGENCY.

438. Every partner, unless restricted by the partnership articles, is the agent of the firm for the transaction of all matters within the scope of the partnership business.

A large proportion, therefore, of the principles of the law of partnership, have their basis in the law of agency. From the fact that each partner has the control of the partnership property and of the partnership business, it necessarily follows that his action, within the scope of the partnership business, must bind the firm.

LIMITED PARTNERSHIPS.

439. A limited partnership is an association, authorized by statute in most of the states, some members of which are liable, not to the full extent of the firm debts, but only to the extent of the amount which they contribute to the capital of the firm.

440. In every limited partnership there must be, at least, one partner who is liable to the full extent of the firm debts.

No such thing as a limited partnership existed under the common law. There has always been a desire, however, on the part of persons entering into partnership, to limit their liability; and this desire has given rise to statutes in nearly all of the American states providing for the formation

of various associations which differ from ordinary partnerships because in them the liability of some or all of their members is limited. Of these various associations, the limited partnership is the one most universally provided for.

Statutes usually provide that, for the formation of such partnerships, it shall be necessary that the fact of its organization be announced to the public in the public press; that the amount of capital contributed by the partners whose liability is limited be named; and that there shall be, at least, one person in the firm whose liability is unlimited. In order that the limitations upon the liability of the other partners shall hold good, the statute must be strictly complied with; otherwise, they are individually liable to the full extent of the firm debts.

PARTNERSHIP ASSOCIATIONS LIMITED.

441. The statutes in many of the states authorize the formation of what are called "partnership associations limited." The members of these associations are liable only to the extent of the amount which they contribute to the capital of the association.

In order that the public be constantly reminded of the fact that the members of these associations have only a limited liability, it is usually required that, in addition to the advertisement of the organization of the association, the name of such association, whenever it is used, shall have the word "Limited" annexed to it. If the name of the association is used, either in advertising matter or in correspondence, without the use of this word, a person not having actual notice of the nature of the association may hold the individual partners liable to the full amount of the association debts.

VOLUNTARY ASSOCIATIONS.

442. A voluntary association is an unincorporated body usually organized for social purposes, and differing from a partnership in that its primary object is not the joint pecuniary profit of its members.

443. Members of such a body are liable individually for such debts of the association as they expressly or impliedly authorize, and for those only.

An example of a voluntary association would be a literary society. In such a society it frequently happens that a constitution is framed and signed by its members, and frequently by-laws are drawn up and adopted. If, in the constitution or by-laws of the association, certain officers of the association are authorized to incur debts on its behalf, the law holds that all who sign or vote for the adoption of the constitution and by-laws make themselves liable for debts contracted in pursuance of their provisions. Where no express authorization of this character exists, it is the rule that all who vote in favor of the particular expenditure make themselves liable on the principles of agency.

JOINT-STOCK COMPANIES.

444. A joint-stock company is an association, usually organized for business purposes, differing from a partnership in that transferable stock is issued to its members, and by this stock their interests are held.

It is a principle of the law of partnership that no new member can be taken into the firm without the consent

of all the present members. In case of a joint-stock company, however, the interest of a member may be transferred to a third person without any reference to the wishes of the other members of the company. So far as liability is concerned, the joint-stock company is governed by the same rules as the ordinary partnership.

CORPORATIONS—PUBLIC AND PRIVATE.

445. A corporation is an artificial person, created by the law, and having an individuality distinct from the members that compose it; its powers being limited to those granted to it by the law by which it is created.

446. Corporations are either public or private. A public corporation is one organized to carry on the local government of a particular district. A private corporation is one organized for purposes private in their nature.

The corporation is the antithesis of the partnership. The members of a firm have full control over the partnership business; the stockholders of a corporation have practically no control over the conduct of corporate affairs. The members of a partnership are individually liable to the full extent of the partnership debts; the stockholders of the corporation are, in the absence of statute, liable only to the amount of their capital stock. A member of a partnership cannot sell his interest to another, so as to introduce a third person into the firm, unless his copartners consent; a stockholder of a corporation may transfer his interest to an outsider by the mere sale of his capital stock.

SAME—HOW CREATED.

447. Corporations may be created either by special charter or under general laws.

It has already been hinted in a previous chapter that the right to exist as a corporation is a franchise, and that all the powers which the corporation may possess are also franchises, and it has been explained that a franchise is a branch or part of sovereign authority delegated to a private person. Under the early common law, these franchises were in many instances granted to private individuals, but in this country they are usually possessed only by corporations. The attitude of the early common law towards corporations was that of discouragement. In order to secure a corporate franchise, it was necessary to obtain a special act of parliament granting it. In later times, however, particularly in this country, the power incident to large combinations of capital to develop the resources of the country was recognized, and corporations have since been more favorably regarded by the government. While, in early times, it was necessary to obtain a special act or charter from the legislative body, at present, in all of the United States, laws have been passed providing a method for the organization of corporations without any recourse to the legislature. These acts are commonly referred to as "General Laws of Incorporation." The enormous growth of corporations in this country has had much to do with its material development.

In order to organize a corporation under the general laws, it is usually necessary for those who wish to become its members to first sign an agreement setting forth the name, objects, and terms of the proposed company. This agreement is called the "Articles of Association." These articles

must ordinarily be filed with the secretary of state, and a duplicate copy must be deposited with some officer, usually the clerk, of the county where the corporation proposes to have its principal office.

SAME—BOARD OF DIRECTORS.

448. The business of a private corporation is necessarily conducted through agents. These agents are usually organized into a body called the "Board of Directors" or the "Board of Trustees."

The board of directors usually has power to manage the general affairs of the corporation. The officers of the corporation are usually elected by this board.

SAME—RIGHTS OF STOCKHOLDERS.

449. The stockholders of a private corporation usually have power to choose the directors, but have no further control over the conduct of the business. Their relations to the corporation are merely contract relations. They contribute their capital, and, in return therefor, are entitled to share in the profits of the concern.

This necessarily follows from the nature of the corporation as an individual entity. The stock which is issued to the members is in the nature of a contract between the artificial personality which is called the "corporation" and the stockholders. The fact that the stockholders have power to select the directors does not change their relations to the corporation. This is merely a provision by the law for the selection of the agents who are to carry on corporate business.

SAME—LIABILITIES OF STOCKHOLDERS.

450. In the absence of statute, the stockholders of a corporation are liable for the debts of the company only to the extent of the face value of the stock which they hold. If this amount has been paid in, they are exempt from further liability.

This principle also follows from the nature of the corporation itself. The stockholders are not identified with it, and are not liable for its debts, except so far as they have made themselves liable by their contract of membership.

SAME—LIMITATIONS OF EXISTENCE.

451. Statutes in this country usually limit the existence of private corporations. In the absence of such limitations, however, their existence is perpetual.

While it has been the tendency of American legislatures to encourage the formation of corporations, it was early found desirable to maintain over them a certain degree of legislative control. In the Dartmouth College Case it was held that a charter granted to a private corporation contains a contract which, under the constitution of the United States, cannot be impaired. Therefore, if some degree of legislative control is not reserved by the legislature, the corporation becomes independent, and cannot afterwards be restricted in its powers. Some states, therefore, in providing for an organization of corporate bodies, reserve the right to modify the charters at will. The limitation of the time of their existence is now quite a universal provision.

CHAPTER XXIII.

TORTS.

452. The Nature of a Tort.
453. The Elements of a Tort.
454. Proximate and Remote Cause.
455. Classification of Torts.
456. Negligence.
457. Nuisance.
458. Conspiracy.
459. Assault and Battery.
460. Defamation.
461. Malicious Prosecution.
462. False Imprisonment.
463–464. Trespass.
465. Conversion.
466. Deceit.
467. Infringement.
468. Violation of Easements.
469. Seduction.
470. Malicious Interference with Contract.

THE NATURE OF A TORT.

452. A tort is a breach of legal duty for which the injured party may maintain a suit for damages.

Whenever a right in rem exists in one person, there is a corresponding duty on the part of the whole community to observe that right. He who violates it may be guilty of a tort or a crime, according to the legal consequences of his act. If his breach of duty is of such enormity as to be regarded as an injury to the community as well as to the individual, it is a crime, and he is punished for it by the state in its own name. If not, the person injured is left to pur-

sue his remedy in his own behalf, the state merely acting as arbiter between him and the wrongdoer. The same act, as has already been said, may involve both of these results, in which case it is both a tort and a crime,—a crime because the state will punish it; a tort because a private suit for damages may be maintained.

A tort is therefore a violation of a right in rem which gives rise to a private right in personam for damages. The moment a right in rem is violated, there springs up a new relation between the wrongdoer and his victim. The latter then has a new right against the former; not, as before, merely a right to claim forbearance, but a right to claim compensation for his injury. This right is not one which he can enforce against the world, but one available against the individual wrongdoer alone,—hence a right in personam.

The primary distinction between a tort and a breach of contract is that the former is a violation of a right in rem, or, as it is usually expressed, a breach of legal duty; while the other is a violation of a right in personam,—a breach of the specific contract obligation. But, just as the same act may be both a tort and a crime, so may the same act be both a tort and a breach of contract. This is well illustrated by the case of the Baltimore City Pass. Ry. Co. v. Kemp.[1] In that case the plaintiff became a passenger on the defendant's railway, thus entering into a contract for safe carriage to her destination, and, while on the defendant's car, was injured. She sued in tort for her injury. The defendant contended that the wrongful act was merely a breach of contract; but it was held that the defendant owed to the plaintiff and to the public in general a duty to be careful, irrespective of contract, and that the negligent violation of that duty was a tort as well as a breach of a contractual obligation. And, as a general rule, there is nothing to prevent

[1] 61 Md. 74.

a promise to observe one's legal duty becoming an element in a contract, in which case any breach of that duty will also be a breach of the contract.

THE ELEMENTS OF A TORT.

453. Out of damage or loss without a wrongful act, no cause of action arises. A tort consists of two elements:

(a) A wrongful act; and

(b) An injury or loss resulting therefrom.

When a person sues for a tort, it is first necessary for him to show that the one he sues has violated his legal right. He must prove an act which is wrongful. It is quite possible for an act which injures another to be innocent in itself. For example, A. may enter into legitimate competition with his neighbor, thus lessening the latter's business; or, again, the injury may be the result of accident. In either of these cases, there can be no recovery of damages, because there has been no wrong.

It is sometimes necessary to show, not only that there has been a wrongful act, but, further, that actual loss has resulted therefrom, in order to maintain an action. But it is usually held that, where there is a clear violation of a legal right, the law will conclusively presume that damage has resulted, even though none has been shown. In such a case the court will award nominal damages in recognition of the right.

The wrongful act itself may consist of (1) nonfeasance, the nonperformance of that which it is one's legal duty to perform; (2) misfeasance, the performance in an improper manner of that which it is one's legal right to do; or (3) malfeasance, the doing of that which one is under a legal duty to refrain from doing.

PROXIMATE AND REMOTE CAUSE.

454. The law holds him responsible whose wrongful act is the proximate, as distinguished from the remote, cause of the injury.

The injury may stand in various relations to the wrongful act. It may result (1) directly and proximately from it; e. g. A. knocks B. down, in which case the injury is as direct as it is possible to be. It may be (2) indirect, but proximate. Let us suppose that employés of a city are engaged in making excavations in the streets for the purpose of constructing sewers. It becomes their legal duty to keep warning lights at the places of danger during the night. By reason of a failure to maintain the necessary signals, a pedestrian falls into one of the excavations, and is injured. Here the wrongful act is, not the maintenance of the excavations, but the failure to put up the lights. It is not as the direct, but only as the indirect or consequential, result of this failure, that the pedestrian is injured. Yet it is the proximate result. The injury may result from the wrongful act (3) remotely. In such a case there is always an intervening proximate cause, to the author of which the law looks as the responsible party.

CLASSIFICATION OF TORTS.

455. A convenient classification of the principal torts may be made, corresponding to the rights which they violate. Thus there are:

(a) Those which may be violations of either or all of the fundamental rights, such as:

(1) Negligence.
(2) Nuisance.
(3) Conspiracy.

(b) Those which violate primarily the right of personal security:
(1) Assault and battery.
(2) Defamation.
(3) Malicious prosecution.

(c) That which violates primarily the right of personal liberty, viz.:
(1) False imprisonment.

(d) Those which violate primarily the right of private property:
(1) Trespass.
(2) Conversion.
(3) Deceit.
(4) Infringement.
(5) Violation of easements.

(e) Those which violate relative rights, viz.:
(1) Seduction, enticement, etc.
(2) Malicious interference with contract.

The classification of torts here given is necessarily incomplete. A full list would be beyond the scope of the present work, and would be impracticable, for the reason that there are numerous torts to which legal usage has not attached definite names.

NEGLIGENCE.

456. Negligence, as a tort, is the inadvertent omission to use that care and diligence which it is a person's legal duty to use, proximately causing injury to another.

If the injury is intentional, it is something more than mere negligence. Negligence is a breach of the duty to use the care required under the particular circumstances. But it will not amount to a tort unless the breach results in damage to the plaintiff.

NUISANCE.

457. A nuisance is such a use of one's own person or property as to substantially violate the rights of another.

A nuisance is a violation of rights growing out of the maxim: "Sic utere tuo ut alienum non lædas." Every man may use his own in his own way so long as he does not encroach upon his neighbor's rights. Consequently, actual injury to the plaintiff is an essential element of this wrong. Common examples of nuisances are found in the maintenance of slaughterhouses and other structures from which offensive odors emanate; the production of an undue quantity of smoke, rendering the neighborhood less healthy or comfortable; illegal obstruction of highways, etc.

CONSPIRACY.

458. Civil conspiracy is a combining or confederating between two or more persons to injure another.

Conspiracy as a tort should be distinguished from conspiracy as a crime. While criminal conspiracy can exist independent of any act in execution of the unlawful purpose, conspiracy as a tort can hardly be said to exist until the unlawful object is fully or partially accomplished. Civil conspiracy usually becomes important because of its tend-

ency to aggravate the damages recoverable, or to render persons liable who participated in the unlawful combination, although they took no part in the substantive wrongful act.

ASSAULT AND BATTERY.

459. An assault is an attempt to unlawfully apply force to the person of another, with the apparent ability to do so. The actual application of force in pursuance of such attempt is a battery.

A mere threat to use violence on another is not an actionable wrong; but, when there is an actual attempt to do so,—an assault,—liability at once arises, although the attempt is unsuccessful, provided there is reasonable ground for belief that the wrongdoer can accomplish his object. If, for example, A. aims at B. a pistol which B. believes to be loaded, if B. is within the distance which the pistol might reasonably be supposed to carry, an assault is committed, although the pistol is, as a matter of fact, unloaded. It is the apparent, not the actual, power of accomplishing the purpose intended which makes the attempt an assault.

A battery always includes an assault, but an assault does not necessarily result in a battery. When the attempt is followed by the actual application of force, the wrong takes the common name of "assault and battery." No particular amount of force is necessary to constitute a battery.

DEFAMATION.

460. Defamation consists of false or malicious statements by one person, resulting in injury, actual or implied, to another. Oral defamation is called "slander"; written defamation is known as "libel."

A defamatory statement, in order to constitute slander or libel, must be made to some person other than the one defamed; otherwise, there can be no injury to the latter's reputation. Libel may take the form of written or printed words, or of pictures, or signs of any kind.

MALICIOUS PROSECUTION.

461. Malicious prosecution is the malicious institution of a judicial proceeding against another without probable cause for believing the defendant liable.

In order to maintain a suit for malicious prosecution, it must be shown (1) that the judicial proceeding complained of resulted in favor of the defendant in that proceeding; (2) that there was want of probable cause for believing the said defendant liable; and (3) that the proceeding was instituted maliciously. But malice is often inferred, as a matter of fact, from a want of probable cause.

FALSE IMPRISONMENT.

462. False imprisonment is the forcible detention of another without legal authority.

The duration, the place, and the manner of the imprisonment are immaterial so long as there is a substantial restraint of the injured person's liberty. Thus, a mere touch on the shoulder may be sufficient under the circumstances to cause a person to submit; and though he is not taken from the street where he is walking, and though the restraint is only momentary, it will be sufficient. The one who thus restrains another may show, however, that he was acting with legal authority; and this will be a complete justification.

TRESPASS.

463. Trespass, in its widest legal sense, includes any wrong to the person or property of another committed with force.

464. In its narrower sense, however, it includes only forcible violations of rights in corporeal property.

It is common to refer to forcible injuries to the person as trespasses to the person. But such wrongs have been differentiated from "trespass" as the term is properly used, and are called by the distinct names "assault and battery" and "false imprisonment."

Trespass may be either to personal property or to realty. Thus, if goods are taken and carried away, a trespass is committed for which an action of "trespass de bonis asportatis" will lie. For a forcible destruction of or injury to either real or personal property, or for an assault and battery, an action called "trespass vi et armis" may be maintained. For an unlawful entry upon the land of another the remedy is an action of "trespass quare clausum fregit." These different forms of action typify different forms of the wrong.

CONVERSION.

465. Conversion is an unauthorized exercise of the rights of ownership over the personal property of another.

The essence of this tort lies in the assumption of the privileges incident to ownership of the property, for however short a time, and for however limited a purpose.

DECEIT.

466. Deceit consists of a false statement of a matter of fact by a person knowing its falsity, or recklessly regardless whether it be true or false, to a person who innocently acts upon such statement, and thereby suffers damage.

The following elements are usually regarded as essential to this tort: (1) A statement untrue in fact; (2) knowledge or reckless ignorance as to whether it be true or false; (3) intent to deceive a particular person, and to lead that person to act upon the statement; (4) an act done by that person in reliance upon the statement; and (5) damages to that person resulting therefrom.

INFRINGEMENT.

467. Infringement is a violation of the rights secured by a patent, a copyright, or a trade-mark.

Thus, an unauthorized manufacture or sale of a patented article is an infringement of patent; an unauthorized publication of a copyrighted literary production is an infringement of copyright; while an unauthorized use of a trade-mark is an infringement of the trade-mark.

VIOLATION OF EASEMENTS.

468. An easement is violated or disturbed when anything is done which prevents its full enjoyment.

The violation of an easement is usually a wrong in the nature of a trespass; but trespass properly includes only injuries to corporeal property.

SEDUCTION.

469. Seduction is the act, on the part of a man, of inducing, without the use of force, a woman to commit unlawful sexual intercourse with him.

Seduction is accomplished by persuasion, but without force. If force is used, the act becomes rape.

MALICIOUS INTERFERENCE WITH CONTRACT.

470. By malicious interference with contract is meant the inducing of one person to break his contract with another, in order to injure that other, or to gain some advantage at his expense.

The essence of this wrong lies in the malicious intent.

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PART 3.

THE ADJECTIVE LAW.

CHAPTER XXIV.

REMEDIES.

471. Scope of the Adjective Law.
472–473. Remedies—Extralegal and Legal.
474–475. Extralegal Remedies—Self-Defense.
476. Recaption or Reprisal.
477. Entry.
478. Abatement of Nuisances.
479. Distress.
480. Accord and Satisfaction.
481–482. Arbitration and Award.
483. Legal Remedies—Penal and Civil.
484. Civil Remedies—Common-Law and Equitable.
485–486. Ordinary Common-Law Remedies—Restoration.
487–491. Damages.
492–493. Extraordinary Common-Law Remedies—Mandamus.
494. Quo Warranto.
495. Prohibition.
496. Habeas Corpus.
497–498. Equitable Remedies—Injunction.
499. Specific Performance.
500–502. Re-execution, Correction, and Rescission.
503. Control of Trusts.
504. Foreclosure of Mortgages.
505. Quieting Title.
506. Partition.
507. Receivers.
508–509. Accounting.
510. Ne Exeat.
511–512. Discovery.
513. Perpetuation of Testimony.
514. Enforcement of Awards and Judgments.
515. Interpleader.

SCOPE OF THE ADJECTIVE LAW.

471. The adjective law concerns itself—

(a) With the remedies applied when a legal right has been violated; and

(b) With the methods of procedure by which those remedies are administered.

The prospect of the application of these remedies is the chief incentive to obedience to the municipal law, and therefore constitutes its principal sanction. Pursuing again the analogy between the methods of law and of medicine, we may say that the remedies of the law are the materials which are designed to heal the wounded rights of individuals.

These remedies may be considered and classified without reference to the methods of their application; but, to be of service, they must be applied. There must be first a determination of the facts in the case, or, in other words, a trial. After this, there must be a selection of the appropriate remedy, and a decision as to the quantity to be applied. The law governing the application of these remedies is called the "Law of Procedure."

To the consideration, therefore, (1) of the remedies of the law, and (2) of the methods of procedure, we will now direct our attention.

REMEDIES—EXTRALEGAL AND LEGAL.

472. A remedy, in the legal sense, is the means which the law employs, or allows to be employed, to protect legal rights and to redress legal wrongs.

473. Remedies, in this sense, are either:

(a) Extralegal; or

(b) Legal.

They are extralegal when they are applied by the injured person, either with or without the co-operation of other persons. They are legal when they are applied through the agencies of the government.

Extralegal remedies are those which the parties concerned are permitted by the law to apply, while legal remedies are those which the law itself applies through its own agencies. Extralegal remedies are few in number, and are generally allowed only in cases of urgent necessity.

EXTRALEGAL REMEDIES—SELF-DEFENSE.

474. Extralegal remedies are of three classes:

(a) Those which may be applied by the sole act of the injured person, including:

(1) Self-defense.

(2) Recaption or reprisal.

(3) Entry.

(4) Abatement of nuisances.

(5) Distress.

(b) That which is applied by the injured party and the wrongdoer jointly, viz. accord and satisfaction.

(c) That which is applied by the injured party and the wrongdoer, with the co-operation of a third person, viz. arbitration and award.[1]

[1] See note 1 on page 286.

475. Self-defense is the means by which a person whose right is threatened himself repels the anticipated wrong.

It has been seen that it is the right of one who apprehends a personal wrong from another to defend himself,—even, in some cases, to the extent of taking the other's life. He has, moreover, the right to defend, not only himself, but his wife and his children; and he may also defend his property, when an injury to it is threatened. It is clearly justifiable, for example, to use force to prevent a trespass upon realty. The degree of force which may be employed is, however, less in such cases than in cases where an injury to the person is feared; and, to prevent the violation of a mere property right, life must not be taken.

SAME—RECAPTION OR REPRISAL.

476. Recaption or reprisal consists of the retaking of persons or personal property by one who, having a legal right to the custody or possession of such persons or property, has been deprived of such custody or possession.

[1] There were, at common law, two peculiar remedies which were applied by the pure operation of law. These were called "retainer" and "remitter." Retainer was allowed when the executor or administrator of an estate was also a creditor of the deceased. It was the right of such an executor or administrator to retain enough of the assets to pay his own debt, and these became his by operation of law. Remitter was the remedy which was applied when one having a good title to a piece of property, but who had been ousted of possession, afterwards came into possession under a defective title. He was then said to be remitted to his prior good title, and held under it thereafter. Neither of these remedies is of any practical importance in this country.

A man may lawfully follow and retake property which has been wrongfully taken from him whenever he can do so without endangering the public peace, and without trespassing on the lands of one who is not privy to the unlawful taking.

SAME—ENTRY.

477. Entry, as a legal remedy, is the taking possession of lands by the person entitled to such possession, when wrongfully excluded therefrom.

The remedies of reception and entry are of the same nature, differing only in the object recovered by them. If this is a person or personal property, the remedy is reception; if real property, it is entry. Entry, as well as reception, must not go so far as to disturb the public peace.

SAME—ABATEMENT OF NUISANCES.

478. The abatement of a nuisance is the removal of the cause of such nuisance by a person who would be injured by its continuance.

This, like the remedy of self-defense, is preventive in its character. It is also subject to the rule that it must not cause a disturbance of the peace. The privilege of abatement is vested in him only who sustains, or would sustain by the continuance of the nuisance, some peculiar injury not shared by the public in general.

SAME—DISTRESS.

479. Distress is the taking by an injured person of a chattel personal belonging to the wrongdoer to secure the satisfaction of the injury.

In this country distress is not usually permitted, except in two instances: When a tenant fails to pay rent due, the landlord may seize any movable property, with certain exceptions, which is rightfully in the tenant's possession, whether it be his own or not, and hold it until the rent is paid. Aiso, when cattle of one man stray upon the lands of another,—that is, when they are damage feasant,—the latter may distrain them, and retain possession of them until he is compensated for the damage sustained. The common-law right of distress is somewhat modified by statutes in the different states.

SAME—ACCORD AND SATISFACTION.

480. An accord is an agreement between the wrongdoer and the injured person to settle the claim of the latter in a certain specified way. A satisfaction is the act of fulfilling or satisfying the terms of the accord.

The law encourages this form of settlement, when it is practicable, because it tends to decrease litigation. An accord not followed by a satisfaction is of no legal effect, because to allow it to take the place of the original claim would be merely to substitute one action for another. But an accord and satisfaction together, known popularly as a "compromise," may be made in settlement of claims growing out of any injuries not of a criminal nature.

SAME—ARBITRATION AND AWARD.

481. Arbitration is the trial of a controverted claim before one or more third persons selected by the parties for that purpose.

482. The persons before whom the claim is tried are known as "arbitrators," the act of referring the dispute to them is called a "submission," and their decision is an "award."

A mere agreement to arbitrate will not be specifically enforced, though damages may be recovered for a refusal to carry out the agreement. When, however, parties have deliberately agreed to submit their controversy to arbitrators, and the matter has been determined by them, and a formal award made, a court of equity will compel the parties to comply with the terms of the award, and a suit upon the original claim will be barred.

LEGAL REMEDIES—PENAL AND CIVIL.

483. Legal remedies—that is, those which are applied through the agencies of the state—are either penal or civil. A penal remedy is one which consists of punishment for the commission of a crime. A civil remedy is one designed to prevent or redress the violation of a private right.

Penal remedies, or modes of punishment for crime, have already been mentioned. It will be remembered that they usually take the form of fines, imprisonment, or capital punishment.

CIVIL REMEDIES—COMMON-LAW AND EQUITABLE.

484. Civil remedies are of two general classes:

(a) Those which are administered by courts of common law; and

(b) Those administered by courts of equity.

One of the chief reasons for the development of the court of chancery in England was that the common-law remedies were inflexible, and therefore inadequate to meet the needs of a growing civilization. In the common-law courts a judgment was rendered either for the plaintiff or the defendant, and, if for the plaintiff, for a certain amount. Equity aimed to remedy this defect of the common-law machinery by directing specifically whatever seemed necessary to do justice between the parties. Equitable remedies are naturally, therefore, numerous, and do not easily lend themselves to classification. On the other hand, common-law remedies are few, and clearly defined.

ORDINARY COMMON-LAW REMEDIES—RESTORATION.

485. Common-law remedies are either ordinary or extraordinary. The principal ordinary common-law remedies are:

(a) Restoration; and

(b) The award of damages.

486. Restoration is the means by which specific goods, of whose possession the owner has been deprived, are returned to him in pursuance of the judgment of a court of law.

When property has been wrongfully taken or wrongfully detained, the common-law courts will afford relief by restoring to the injured party the specific thing. In most cases, however, the remedy afforded is the substitution of a sum of money for the goods lost. Money is a commodity of the most universal utility, and, when it seems impracticable to attempt to fully restore the injured person to his condition before his right was violated, the award of money by way of

compensation is regarded as a sufficiently desirable substitute. Money so awarded is called "damages."

SAME—DAMAGES.

487. By "damages" is meant a sum of money recovered by an injured party from his injurer in pursuance of the judgment of a court of law.

488. As to the purpose for which they are awarded, damages are either:

(a) Nominal;

(b) Compensatory; or

(c) Exemplary.

489. Nominal damages are those designed merely to affirm or recognize a right which has been violated, though no actual injury is shown.

490. Compensatory damages are those designed to compensate an injured person for the loss which he has sustained.

491. Exemplary damages are those designed as punishment to the wrongdoer who has committed an act in a malicious or wanton manner.

It has been seen that a right may be violated without any appreciable loss. The law presumes, however, that some loss has followed; and, as the loss is nominal, the damages are nominal. They consist usually of a few cents only, and are awarded in recognition of the existence of the right.

Compensatory damages are the kind usually awarded. Where there has been some substantial loss, it is the object of the law to compel payment for whatever damage has been sustained. For this purpose, it is sometimes difficult to estimate the exact pecuniary value of the injury, and a

mass of law has therefore accumulated on the subject of the measure of damages.

In many of the States, courts are allowed to go further than mere compensation, and to award exemplary or punitive damages, or smart money. Although these damages are paid to the injured person, he does not receive them because he is entitled to them, but because, when one has been guilty of a malicious or wanton act, public policy is supposed to demand that he be compelled to pay more than mere compensation, on account of his evil nature. They are penal in their character.

EXTRAORDINARY COMMON-LAW REMEDIES—MANDAMUS.

492. The leading extraordinary common-law remedies are those administered through the

(a) Writ of mandamus; the

(b) Information in the nature of a quo warranto; the

(c) Writ of prohibition; and the

(d) Writ of habeas corpus.

493. A writ of mandamus is an order issuing from a common-law court of competent jurisdiction commanding a public officer, a corporation, or an inferior court to perform some duty which is imposed upon such officer, corporation, or court by law.

This writ was used originally by the king to direct a subject to perform any desired act. But it was later issued, at the petition of a private person, to compel the performance, by an officer, corporation, or court, of some legal duty, in cases where there is no ordinary common-law remedy which is specific and adequate.

SAME—QUO WARRANTO.

494. An information in the nature of a quo warranto is an information, presented to a court of competent jurisdiction, designed to test the authority of a corporation or public officer to exercise the functions assumed by such corporation or officer.

Anciently this remedy was administered through the writ of quo warranto, but this was gradually superseded by the information. The writ is, in form, a civil proceeding; the information, criminal. In effect, however, the quo warranto information is now a purely civil matter. Its object is to compel the corporation or officer to show by what authority (quo warranto) certain functions are exercised.

SAME—PROHIBITION.

495. A writ of prohibition is an order issuing from a superior to an inferior court, commanding the inferior tribunal to cease proceeding in a particular case, because that case involves matters in excess of its jurisdiction.

The writ of prohibition issues to prevent a usurpation of jurisdiction by an inferior court. It prohibits such court from proceeding further in a cause already commenced, and which, because of the limited nature of its judicial powers, it has no authority to determine.

SAME—HABEAS CORPUS.

496. A writ of habeas corpus is an order issuing from a common-law court requiring a person in confinement to be brought before it, in order that the legality of the confinement may be tested.

This writ is the summary remedy in all cases of false imprisonment. It will issue whether the restraint be under cover of criminal or civil proceedings, or without any show of justification. It may be applied for by the person who is wrongfully detained, by some other person on his behalf, or by any one who has a right to his custody, as his parent, guardian, etc.

EQUITABLE REMEDIES—INJUNCTION.

497. Those equitable remedies most frequently applied may be conveniently grouped as follows:

(a) That designed to prevent the commission of wrongs:

(1) The injunction.

(b) Those designed to regulate and enforce contract obligations:

(1) Compelling specific performance.

(2) Re-execution.

(3) Correction.

(4) Rescission.

(c) Those designed to regulate and protect property rights:

(1) The regulation and enforcement of trusts.

(2) The foreclosure of mortgages.

(3) Quieting title.

(4) Partition of joint estates.
(5) Appointment and control of receivers.
(6) Accounting.

(d) Those designed to aid and enforce adjudications:
(1) Granting writs of ne exeat.
(2) Discovery.
(3) The perpetuation of testimony.
(4) The enforcing of awards.
(5) The enforcing of judgments.

(e) Miscellaneous:
(1) Interpleader.

498. A writ of injunction is a writ, issuing out of a court of equity, commanding a person to do, or to refrain from doing, some act therein specified.

If it commands him to do some act, it is called a "mandatory injunction." If it orders him not to do the act, it is said to be "prohibitory." Injunctions are most frequently of the latter class.

SAME—SPECIFIC PERFORMANCE.

499. By a "decree of specific performance" is meant an order, by a court of equity, requiring a party to a contract to fulfill his obligations under such contract.

He is directed to do whatever he has promised to do in his agreement. Specific performance of a contract is granted only when the award of damages is not an adequate remedy for the breach.

SAME—RE-EXECUTION.

500. When a written contract or other instrument has been lost, equity will sometimes decree that it be again executed.

SAME—CORRECTION.

501. When it is shown that there was mutual error in the framing of a written instrument, equity will decree that the instrument be revised so as to express the exact intention of the parties.

SAME—RESCISSION.

502. In cases where fraud, or some other reason, renders it inequitable that a contract should be enforced, equity will order such contract surrendered for cancellation or rescission.

SAME—CONTROL OF TRUSTS.

503. Equity assumes control over all trust estates, compels trustees to perform their duties, and, when the interests of the cestui que trust render it necessary, may remove the trustee and appoint a successor to him.

The origin and nature of the trust estate have already been explained. Over this estate the courts of equity have always cast their protection.

SAME—FORECLOSURE OF MORTGAGES.

504. By the "equitable foreclosure of a mortgage" is meant a decree of a court of equity by virtue of which the mortgagor's rights in the property are cut off, in the interest of the mortgagee.

The foreclosure of mortgages in this country may assume one of two different forms, according to the views of the nature of a mortgage which prevail in the particular jurisdiction. In those States where the mortgage is regarded as a conveyance of the title to the land, subject to the right of the mortgagor to redeem it upon payment of the mortgage debt, foreclosure is the proceeding which perfects the mortgagee's title, by cutting off the mortgagor's equity, or right to redeem. Where, however, the mortgage is regarded as a mere lien upon the property, a decree of foreclosure is an order that the premises be sold, and the proceeds applied, so far as necessary, to the payment of the mortgage debt.

It is common to insert in the mortgage itself a provision that in case of default the mortgagee shall have power to sell the property in satisfaction of the claim. Where such a power of sale exists, it is not usually necessary to resort to a court of equity in order to accomplish a valid foreclosure. There are, however, usually statutory regulations of the foreclosure under a power of sale, designed to protect the mortgagor's interests.

SAME—QUIETING TITLE.

505. Whenever a deed or other instrument exists, which, though invalid, may yet, when the evidence necessary to overthrow it is lost, cast suspicion upon the owner's title to his property, a

court of equity will, upon application by such owner, direct the instrument to be canceled

This proceeding is also referred to as "removing a cloud from the title." The remedy is applied because there is a fear that the outstanding invalid conveyance may cause the owner trouble at some time in the future, when the evidence of his title is no longer in existence.

SAME—PARTITION.

506. Concurrently with the courts of common law, equity has power, in most jurisdictions, to decree the partition of joint estates.

Partition is usually a matter of right. It may, of course, take place by agreement of the parties; but, in cases where they cannot agree, resort is had to the courts. If the property cannot itself be divided without greatly lessening its value, the court will order it sold and the proceeds distributed among the tenants in proportion to their shares.

SAME—RECEIVERS.

507. A receiver is a disinterested person appointed by a court of equity to take charge of property in litigation when it is unjust that either party to the suit should hold it.

In the management of the property the receiver acts, not as the agent of either party to the suit, but as an officer of the court.

SAME—ACCOUNTING.

508. An account is a detailed statement of receipts and payments in connection with a particular business or trust.

509. Equity will compel a person to render an account whenever it is necessary to protect equitable rights. It will usually order payment of the balance thus found due.

Thus, a partner, a guardian, an administrator, or any one in a position of trust, may be compelled to account to the one for whose benefit the trust is exercised.

SAME—NE EXEAT.

510. A writ of ne exeat is a writ issuing out of a court of equity, restraining a person from leaving the jurisdiction of the court.

This writ is granted in cases where it is feared that the defendant in a case will abscond, to the irreparable injury of the plaintiff. The writ itself commands the sheriff to apprehend the defendant and keep him in custody until he gives security to abide by the decree of the court.

SAME—DISCOVERY.

511. Discovery is the act, on the part of the defendant, of revealing, by a statement under oath, such facts relating to the plaintiff's case as are within the defendant's knowledge.

512. A court of equity will compel discovery whenever the facts sought are required in aid of legal proceedings.

At common law, the parties to a cause were not competent to testify as witnesses in that cause. Hence, if one party wished to secure evidence of facts which were exclusively within the knowledge of the other party, he was ob-

liged to resort to equity to secure a sworn statement of them. At present this remedy is falling into disuse, because in all civil actions the parties may be compelled to testify.

SAME—PERPETUATION OF TESTIMONY.

513. When a person's rights are not actually threatened, but he has ground to fear that they may be at some future time, when the evidence necessary to sustain them may be lost, a court of equity will decree that the testimony of witnesses shall be taken, and shall remain as a perpetual memorial for future use.

In order to secure this relief, the plaintiff must show that it is impossible that his rights should be at once submitted to a judicial investigation.

SAME—ENFORCING OF AWARDS AND JUDGMENTS.

514. A court of equity will lend its aid to enforce awards and judgments in certain cases, when its assistance becomes necessary.

Thus, when the award directs the performance of some act other than the payment of money, the common-law courts cannot usually enforce such performance, and equity must be resorted to. And if a defendant against whom judgment has been rendered fraudulently conceals his property, or conveys it away, equity will aid him in discovering it and appropriating it to his claim.

SAME—INTERPLEADER.

515. Where a person has in his possession property to which two different parties make a claim, he may file a bill of interpleader, upon which the

court of equity will decide to which of them the property belongs.

The person filing the bill is a mere stakeholder, claiming no interest in the subject-matter himself. He does not feel safe in determining which of the two claimants is entitled to its possession. The two claimants are said to "interplead"; that is, they appear in favor of their respective claims, and the court determines, upon the showing which they make, their rights.

CHAPTER XXV.

COURTS AND THEIR JURISDICTION.

516. Courts in General.
517. Courts of Record, and Not of Record.
518–519. Jurisdiction—Original and Appellate.
520. General and Limited.
521. Exclusive and Concurrent.
522. Courts of England before 1873—Courts of Original Jurisdiction.
523. Courts of Intermediate Appeal.
524. Courts of Final Appeal.
525–527. Courts of England since 1873.
528. Courts of the United States—Federal Courts.
529. State Courts.

COURTS IN GENERAL.

516. The term "court" is used in the law in two senses:

(a) To indicate that governmental agency through which the laws are interpreted and applied, consisting of one or more judges;

(b) To denote the place where those judges exercise their functions.

Thus, when the "jurisdiction of the court" or the "decision of the court" is spoken of, it is clear that the term "court" is used to signify the judges acting in their official capacity. But a person is sometimes referred to as "coming into court," in which case it is equally plain that the place where those judges meet to perform their duties is in mind. Using the

term in the latter sense, Blackstone defines a "court" as "a place where justice is judicially administered."

COURTS OF RECORD, AND NOT OF RECORD.

517. A court of record is one, the formal record of whose proceedings is received in other courts as conclusive evidence of the facts therein related. A court not of record is one whose records are not entitled to be so received.

Whether a court is or is not a court of record does not depend upon whether a record of its proceedings is kept or not, but rather upon the character of that record as evidence in other courts. Many courts not of record keep accurate minutes of their proceedings. In this country courts are usually created by statute, and it is customary for the statute which establishes a tribunal to state expressly whether or not it is to be a court of record.

JURISDICTION—ORIGINAL AND APPELLATE.

518. Jurisdiction is the power to hear and determine controversies, and to apply the law to them.

519. Jurisdiction is either original or appellate. Original jurisdiction is the power to hear and determine controversies in the first instance. Appellate jurisdiction is the power to review and correct the action of an inferior court.

It is the policy of both England and America to allow the defeated suitor to appeal his case to a higher court, if he feels himself aggrieved. The lower court may have been influenced by passion or prejudice, or it may have erred in its

construction of the law. In either case, it is desirable that there be a higher tribunal, composed of judges of great learning and upright character, which may be appealed to to correct such a miscarriage of justice.

SAME—GENERAL AND LIMITED.

520. Jurisdiction is either general or limited. A court has general jurisdiction when it has power to decide all controversies which may come before it, or all except those of some particular class. A court has limited jurisdiction when it can decide controversies of a particular class only.

Thus, it is common, in this country, to assign to a special court jurisdiction in matters relating to the administration and distribution of the estates of deceased persons. A court having powers only in that particular class of cases would be a court of limited or special jurisdiction. But, after all special jurisdictions are parceled out, there is always some court which has the residue of original jurisdiction. The jurisdiction of such a court is general.

SAME—EXCLUSIVE AND CONCURRENT.

521. Exclusive jurisdiction is that which a court possesses in controversies which cannot be heard and determined in any other court. Concurrent jurisdiction is that which a court has in controversies of such a nature that some other court might, if it had been appealed to, have heard and determined.

When two courts have concurrent jurisdiction over a certain subject-matter, it is usually at the option of the party

commencing suit to choose in which of the two he will institute proceedings. When, however, he has exercised his option, the court which he has chosen secures exclusive jurisdiction in that particular case.

COURTS OF ENGLAND BEFORE 1873—COURTS OF ORIGINAL JURISDICTION.

522. The leading English courts of original jurisdiction prior to 1873 were:

(a) The court of king's (or queen's) bench.

(b) The court of common bench or common pleas.

(c) The court of exchequer.

(d) The court of chancery.

(e) The court of admiralty.

(f) The court of probate.

(g) The court for divorce and matrimonial causes.

The American lawyer or student finds in the decisions of the English courts the fountain head of the common law. It is therefore desirable, in order to enable him to appreciate the value of the decisions of a particular court, that he know in a general way how jurisdiction is parceled out in England. In 1873 the courts of England were remodeled; but, inasmuch as most of the great leading cases were decided before that time, the old English judicial system is of even greater interest to us than that of the present. A brief outline of both the old and the new systems will be given.

The Court of King's (or Queen's) Bench.

This court can be traced back to the twelfth century. It was the most important of the common-law courts, receiv-

ing its name on account of the fact that in it the sovereign was supposed to sit in person. It had jurisdiction in pleas of the crown, i. e. criminal cases, and in all suits between subject and subject, except real actions. It also had power to issue extraordinary writs, such as writs of mandamus and quo warranto.

The Court of Common Pleas.

This court owes its origin to Magna Charta, which provided that common pleas, i. e. suits between subject and subject, as distinguished from pleas of the crown, should be held at some certain place, no longer following the king. Inasmuch as the king's bench necessarily accompanied the king on his journeys throughout the kingdom, a new court—that of the common pleas—became necessary, and was established at Westminster. Its name sufficiently indicates its general jurisdiction.

The Court of Exchequer.

The exchequer was the financial agency of the government. But it early began to assume judicial functions in connection with the management of the royal revenue. By a gradual enlargement of its jurisdiction, it took cognizance of all suits between subject and subject, except a few in which the court of common pleas had exclusive jurisdiction.

The Court of Chancery.

The origin of this court, and its general jurisdiction, have been explained in a previous chapter.

The Court of Admiralty.

The admiralty court existed as early as the fourteenth century, and had jurisdiction in matters arising wholly at sea.

The Courts of Probate and of Divorce.

The probate of wills and the administration of estates, as well as all matrimonial causes, were, until the middle of the present century, in charge of the ecclesiastical courts. In

1857, however, jurisdiction in such matters was transferred to the court of probate and the court for divorce and matrimonial causes.

SAME—COURTS OF INTERMEDIATE APPEAL.

523. There were, in England, three courts having an appellate jurisdiction, but whose decision was yet subject to be appealed from. These were known as the "Courts of Intermediate Appeal," and were as follows:

(a) The exchequer chamber.

(b) The court of appeal in chancery.

(c) The full court in matrimonial causes.

The Exchequer Chamber.

This court was established in 1822 as a court of intermediate appeal from the three great common-law courts,—the king's bench, the common pleas, and the exchequer.

The Court of Appeal in Chancery.

In 1851 two lord justices of appeal were appointed to sit, with or without the chancellor, as a court of intermediate appeal from the court of chancery.

The Full Court in Matrimonial Causes.

This court had jurisdiction to review the decisions of the judge ordinary of the court for divorce and matrimonial causes.

SAME—COURTS OF FINAL APPEAL.

524. The courts of final appeal prior to 1873 were:

(a) The house of lords.

(b) The judicial committee of the privy council.

From the court of probate, the court of exchequer chamber, the court of appeal in chancery, and the full court for divorce and matrimonial causes, as well as from the Scotch and Irish courts, an appeal lay to the house of lords. The judicial committee of the privy council entertained appeals from the admiralty and ecclesiastical courts, and from the colonial courts.

COURTS OF ENGLAND SINCE 1873.

525. Under the judicature acts of 1873 and 1875, all of the courts of original jurisdiction and the courts of intermediate appeal were consolidated into the supreme court of judicature, and this was subdivided into:

(a) The high court of justice.

(b) The court of appeal.

526. The high court of justice is again subdivided into:

(a) The queen's (or king's) bench division.

(b) The common-pleas division.

(c) The exchequer division.

(d) The chancery division.

(e) The probate, divorce, and admiralty division.

527. The court of appeal consists of five lord justices of appeal, together with the master of the rolls. From its decisions an appeal may be taken to the house of lords.

The jurisdiction of the different divisions of the high court of justice corresponds in the main to that of the old courts of the same name. Any division may, however, apply equi-

table rules, and, when law and equity conflict, it is provided that equity shall prevail.

COURTS OF THE UNITED STATES—FEDERAL COURTS.

528. In the United States, both the Federal government and each State has a complete system of courts. The courts of the Federal government include:

(a) The supreme court of the United States.
(b) The circuit courts of appeals.
(c) The circuit courts.
(d) The district courts.
(e) The court of claims.
(f) The court of private land claims.
(g) The United States senate.
(h) The territorial courts.
(i) The courts of the District of Columbia.

The constitution of the United States provides that "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish." In pursuance of this provision, congress, on September 24, 1789, passed an act, now commonly referred to as the "Judiciary Act of 1789," establishing a system of courts, which, with some modifications, still exists.

The courts of the Federal government have jurisdiction in "all cases in law and equity arising under the constitution, the laws of the United States and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and

citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens and subjects."

The Supreme Court of the United States.

This court consists of nine judges, appointed by the president of the United States by and with the consent of the senate. In addition to his duties on the bench of the supreme court, each justice is assigned to one of the nine circuits, and must hold a term of the circuit court of the United States at least once in two years. The supreme court has original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state is a party; but its principal jurisdiction is appellate. Prior to the passage of the Evarts Act of March 3, 1891, it was the general court of appeal from the inferior Federal courts.

Under the Evarts Act of 1891, the entire appellate jurisdiction is divided between the supreme court and the circuit courts of appeals. In addition to appeals from the court of claims, the court of private land claims, the courts of the territories and of the District of Columbia, and, in some cases where a constitutional question is involved, from the highest court of a State, appeals lie from the circuit and district courts directly to the supreme court in the following cases:

(1) Where the jurisdiction of the court is in issue.

(2) From the final decree in prize cases.

(3) In cases of conviction of infamous crimes.

(4) Where the construction of the constitution of the United States is involved.

(5) Where the constitutionality of any Federal law, or the validity or construction of any treaty, is in question.

Appeals may be taken from the circuit courts of appeals to the supreme court in all cases where the matter in con-

troversy is more than $1,000, except in admiralty, patent, revenue, and criminal cases, and those in which jurisdiction depends entirely on the citizenship of the parties.

The Circuit Courts of Appeals.

These courts were established by the Evarts Act of 1891, already referred to. There are nine of them, consisting of three judges each, who may be any three of the following: The supreme court judge assigned to the particular circuit, the circuit judges for that circuit, and the district judges whose districts are therein. It has appellate jurisdiction from the circuit and district courts, and in such cases coming from the territorial courts as may be assigned to the particular circuit.

The Circuit and District Courts.

The United States is divided into nine circuits, to each of which are assigned two circuit judges. The circuit court may be held by the supreme court justice assigned to the particular circuit, either of the circuit judges, the district judge of the district in which it is held, or by any two of them together.

Each circuit is divided into districts. Some States constitute a single district, while others contain two or more, each district having assigned to it a district judge.

The circuit and district courts have divided between them the greater part of the general original jurisdiction vested in the judicial department. It will be beyond the scope of the present work to give the details of their jurisdiction.

The Court of Claims.

This court was established in 1855 to hear and determine claims of individuals against the Federal government. It consists of five judges.

The Court of Private Land Claims.

This court was established in 1891 to settle disputes concerning the title to certain lands in the Western States claimed under Spanish and Mexican grants. By the terms of the act creating it, its existence was limited to December 31, 1895.

The United States Senate.

As a court, the senate has jurisdiction to try impeachment cases only.

The Territorial Courts and the Courts of the District of Columbia.

The Federal government, having power to govern the territories of the United States, has provided judicial systems for them. It is unnecessary, however, to give the details of their organization.

SAME—THE COURTS OF THE STATES.

529. The systems of courts in the various States differ widely from each other, but have some general features in common. There are a court of final appeal, a court of general original jurisdiction, a court of inferior original jurisdiction, and a court of special probate jurisdiction in each State.

In most States the court of final appeal or of last resort is called the "supreme court" of the State, although in many States it is known as the "court of appeals." Provision is sometimes made for a court of intermediate appeal. The courts of general original jurisdiction are usually called "circuit courts," or "district courts," or "courts of common pleas." The judges of the inferior courts are known as "justices of the peace," "trial justices," or "magistrates." The court of special probate jurisdiction is usually styled the "probate court," but in Pennsylvania it is called the "orphans' court," and in New York, the "surrogate's court."

CHAPTER XXVI.

PROCEDURE.

530–531. Procedure in General.
532. The Essentials of Procedure.
533–539. Common-Law Procedure—Forms of Action.
540. Common-Law Procedure—Outline.
541. Equity Procedure—Outline.
542. Code Procedure—Outline.
543. Criminal Procedure—Outline.

PROCEDURE IN GENERAL.

530. The term "procedure" is used to indicate the various steps or processes in the adjudication of controversies in courts.

531. The most common forms of procedure in vogue at present in this country are:

(a) Common-law procedure.

(b) Equity procedure.

(c) Code procedure.

(d) Criminal procedure.

Procedure is the method of applying the remedies of the law. There are plain reasons why various forms of procedure arose. Different methods would naturally be employed in the apprehension and punishment of a criminal from those in use in determining disputes between subject and subject. Furthermore, the court of chancery, influenced as it was by the traditions of the civil law, developed a system peculiar to itself, adapted to the application of its special remedies. And upon the introduction of the codes another system was established, which, though following in the main the equity practice, yet has borrowed freely from the other systems.

THE ESSENTIALS OF PROCEDURE.

632. Whatever may be the particular form of procedure, the following essential steps appear:

(a) An application to the courts.

(b) The original process.

(c) Appearance of the opposite party.

(d) Pleadings.

(e) A trial.

(f) A decision.

(g) An enforcement of the decision.

Courts do not take the initiative in a case. Until appealed to, they will not attempt to decide a controversy. Consequently, there must, in all forms of procedure, be some method of applying to the court for the redress of an alleged wrong.

But, in order that justice may be done, it is also necessary that the party against whom relief is sought shall be notified, and allowed to appear and defend himself, if he so desires. This is done by the issuing and serving upon him a notice that suit has been commenced against him. This notice is called a "writ." It is a form of what is usually known as "process."

Both parties being in court, the next step is to ascertain the nature of the dispute. This is done by means of the pleadings, which are the formal statements of the cause of complaint, on the one hand, and the ground of defense, on the other.

The parties having made their statements or pleadings, a trial is necessary to determine the rights of the parties. Each party produces his witnesses, and the judge or the jury determine the facts from their testimony. The next step is to determine the appropriate remedy, and to render a decision

involving the conclusions arrived at. It then only remains necessary to enforce the decision by appropriate means.

This being the general plan of the various systems of procedure, the present chapter will be devoted to an explanation of some of the peculiarities of the different systems.

COMMON-LAW PROCEDURE—FORMS OF ACTION.

533. A proceeding in a court of common law is called an "action." Actions are of three general classes: Real actions, mixed actions, and personal actions.

534. The old forms of real actions corresponded with the following writs:

(a) The writ of right.
(b) The writ of entry.
(c) The writ of formedon.
(d) The writ of dower.
(e) The writ of right of dower.
(f) The writ of quare impedit.

535. The most common mixed action is the action of ejectment.

536. Personal actions are either:

(a) Actions ex contractu;
(b) Actions ex delicto.

537. The principal actions ex contractu are those of:

(a) Assumpsit;
(b) Debt;
(c) Covenant.

538. The principal actions ex delicto are those of:

(a) **Trespass;**
(b) **Trespass on the case;**
(c) **Trover;**
(d) **Replevin.**

539. The action of detinue is sometimes classed as an action ex contractu, and sometimes as an action ex delicto.

It has already been noticed, as one of the reasons for the development of the court of chancery in England, that relief in the common-law courts could not be had unless the suitor's claim was of such a nature that the writs in common use would cover it. In other words, it must fall within one or other of the actions which were allowed. While the scope of these actions is much wider at present than it was at that time, by reason of the introduction of new forms of action, yet the general principle still holds true, in the common-law practice, that a case must be in the form of one of the actions above mentioned, or relief cannot be granted.

A real action is one whose object is the specific recovery of real property. A personal action is one whose object is the specific recovery of personal property, or the recovery of damages for an injury. A mixed action is one in which both damages and the specific recovery of real property are sought.

The principal real actions formerly in use were those corresponding to the following writs: (1) The writ of right, which issued when the plaintiff sought the specific recovery of corporeal hereditaments, basing his claim upon a title to an estate in fee simple therein. (2) The writ of entry, under which the plaintiff, having been wrongfully dispossessed of lands, could recover them. (3) The writ of formedon, which was used when the plaintiff claimed the right to real property as tenant in tail, or as remainder-man or reversioner after

the termination of an estate tail. The three foregoing forms of action have been abolished in England, and in most of the United States. (4) The writ of dower, which issued in favor of a widow who claimed the specific recovery of her dower, no part of it having been assigned to her. (5) The writ of right of dower, under which the widow claimed the residue of her dower, part of it having already been assigned. (6) The writ of quare impedit, under which the plaintiff claimed that his right to a benefice was obstructed, and sought its recovery. Of the three last-mentioned writs, the writ of dower and the writ of right of dower are still used, although in most States they have given way to the mixed action of ejectment. The writ of quare impedit is not in use in this country.

The action of ejectment is the leading mixed action, and into it have been merged, in most jurisdictions, all of the old real actions. It is an action for the specific recovery of land, and for damages for its detention.

Actions ex contractu are those based upon contract, express or implied. Actions ex delicto are those based upon delict or tort. An action of assumpsit is one brought for the recovery of damages for the breach of a simple or parol contract. An action of debt is one brought for the recovery of a liquidated or certain sum of money. An action of covenant is one brought to recover damages for the breach of a covenant or contract under seal. An action of trespass is one brought for the recovery of damages for a direct and forcible injury to the plaintiff's person, or corporeal property. An action of trespass on the case lies to recover damages for an injury to person or property which is either not forcible or not direct. An action of trover is one brought to recover damages for the wrongful conversion of personal property. An action of replevin is one for the specific recovery of personal property, and for damages for its detention.

COMMON-LAW PROCEDURE—OUTLINE.

540. Under the common-law system of procedure,

(a) Suit is commenced by the filing of a præcipe and the issuing of an original writ.

(b) The defendant appears either in person or by attorney.

(c) The pleadings are in the following order:

(1) The plaintiff's declaration.

(2) The defendant's plea, or, when he wishes to raise a question of law, his demurrer.

(3) The plaintiff's replication to the plea.

(4) The defendant's rejoinder.

(5) The plaintiff's surrejoinder.

(6) The defendant's rebutter.

(7) The plaintiff's surrebutter.

(d) The trial is usually by jury.

(e) The decision of the jury is called a "verdict," upon which the court renders a judgment.

(f) The judgment is enforced by means of an execution.

The Præcipe and Original Writ.

The præcipe is merely a request that an original writ issue. It was in England filed in the court of chancery, from which the writ issued. The writ itself was an order, under the great seal and in the king's name, directed to the sheriff of the county where the injury was supposed to have been committed, instructing him to command the defendant to

satisfy the plaintiff's claim, or to appear in one of the superior common-law courts to defend the action.

The Pleadings.

The defendant having appeared in response to the writ, the pleadings commence. Originally these were oral altercations in open court. The judge sat as moderator of the proceedings, and caused the parties, as rapidly as possible, to come to an issue; that is, to reduce their dispute to some single, material point, affirmed on one side and denied on the other. The object of pleading at the common law was the production of a single issue.

At present the pleadings in all principal courts are in writing. The plaintiff first files his declaration. A "declaration" is defined to be a formal statement of the facts constituting the plaintiff's cause of action. The defendant may then pursue one of two courses: He may deny the facts stated in the declaration, or he may claim that, even if those facts are true, still they do not show a right to recover. The former course would involve the filing of a plea; the latter, of a demurrer. The former would tend to raise an issue of fact; the latter, an issue of law. If a demurrer is filed, the plaintiff's next step would be to join in the demurrer, and the issue of law is complete. If a plea is filed, it may either be a plea of traverse, which merely denies the facts in the declaration, or a plea of confession and avoidance, which admits the facts in the declaration to be true, but sets up new facts which alter their legal effect. To the new matter thus set up, the plaintiff, in his replication, may traverse, or confess and avoid, as may either of the parties in any of the subsequent pleadings. But, upon a traverse, issue must be tendered; and this issue, when well tendered, must be accepted. Consequently, whenever either party, at any stage of the proceedings, traverses, there must follow a joinder in issue, and the pleadings are at an end.

The Trial.

A discussion of the trial will be deferred until the next chapter.

Verdict and Judgment.

The jury are the judges of the facts in the case, while the judge determines the law applicable to these facts. In practice, the court instructs the jury in the law which bears upon the case, and under such instructions the jury determines which party shall prevail. Their decision is called a "verdict." If the verdict is for the plaintiff, the jury also report the amount of damages to which he is entitled.

The judgment is, as its name implies, a statement of the conclusion at which the judge and jury have jointly arrived. It is a determination of the rights of the parties, but it does not command any affirmative action on the part of either party. It decides, but for the enforcement of the decision an execution is necessary.

Execution.

Upon a judgment in his favor, the plaintiff, after waiting a reasonable time, within which to allow the defendant to appeal, if he so desires, is entitled to a writ of execution. This is a writ directed to the sheriff, or some other executive officer who is by law qualified for such purpose, usually commanding him to levy upon enough of the property of the defendant to satisfy the judgment.

EQUITY PROCEDURE—OUTLINE.

541. Under the equity system of procedure,

(a) Suit is commenced by the filing of a bill of complaint.

(b) The writ by means of which the defendant is summoned into court is called a "subpœna."

(c) The defendant may appear either in person or by attorney.

(d) The pleadings are in the following order:

(1) The bill of complaint.

(2) The defendant's answer, plea, disclaimer, or demurrer.

(3) The plaintiff's replication.

(e) The trial is usually without a jury.

(f) The decision of the court is embodied in its decree.

(g) The decree is enforced by punishing the party who fails to obey it.

The Bill of Complaint.

The bill, in equity, serves the twofold office of an appeal to the court, and the first of the plaintiff's (or complainant's) pleadings. In form, the bill calls the attention of the court to the facts upon which the claim for relief is based, and prays the court to issue a subpœna to the defendant (or respondent), and, upon hearing, to grant the relief sought.

Subpœna and Appearance.

The "subpœna" is a writ directed to the defendant, requiring him to appear at a certain time, upon penalty of having the bill taken as confessed against him. His appearance may be in person or by attorney.

The Pleadings.

There is much less formality in the pleadings in equity than is required in those at common law. There is only one form of action. When the defendant appears in response to the subpœna, he has his choice of four courses. If he claims no interest whatever in the subject-matter of the bill, he files a disclaimer. If he regards the bill as insufficient

in point of law, he demurs. If he sees some single, material fact, upon the truth or falsity of which he is willing to base his defense, he files a plea, which in equity is quite different from the plea at common law. If he wishes to make a more general denial, he embodies his defense in an answer. To the plea or answer the plaintiff files a replication, and the case is at issue.

The Trial.

The form of trial will be noticed hereafter.

The Decree and its Enforcement.

This differs materially from a judgment at law. While a judgment is a mere statement of the rights of the parties, a decree goes further, and directs specifically what each party is to do in order to accomplish justice. If any party refuses to obey the orders of the decree, he is guilty of contempt of court and is punished accordingly.

CODE PROCEDURE—OUTLINE.

542. Under most of the Codes,

- **(a) Suit is commenced by the filing of a complaint or petition.**
- **(b) The writ by which the defendant is notified is usually called a "summons."**
- **(c) The defendant may appear either in person or by attorney.**
- **(d) The only pleadings usually allowed are:**
  - **(1) The complaint or petition.**
  - **(2) The answer or demurrer of the defendant.**

(3) The reply or demurrer to the answer.

(4) The demurrer to the reply.

(e) The trial may be with or without jury.

(f) The court's decision may take the form of a judgment or a decree, according to whether the action is of a legal or equitable nature.

(g) If the action is legal in its nature, the judgment is enforced by execution; if equitable, by contempt of court proceedings.

Under the codes, it is usually provided that distinctions between actions at law and suits in equity shall no longer be recognized, and that there shall be but one form of action, known as a "civil action." The procedure itself corresponds in most respects to that in equity, except that when the case is in its nature legal, as distinguished from equitable, judgment is rendered and execution issued thereon as under the common-law system.

CRIMINAL PROCEDURE—OUTLINE.

543. The common steps in a criminal trial are as follows:

(a) **Arrest of the defendant, with or without warrant.**

(b) **Commitment and bail.**

(c) **Prosecution.**

(d) **Arraignment.**

(e) **Plea and issue.**

(f) **Trial and verdict.**

(g) **Sentence.**

(h) **Execution.**

Arrest.

Arrest is the apprehension of the person of the defendant in order to secure his presence at the trial. A warrant is a writ issued to an officer, or to a private person, commanding him to arrest the defendant and bring him before the proper officer or court to answer for his crime. An arrest may be made by an officer or private person without warrant when a crime is being committed in his presence by the defendant, or when he has probable cause for believing that the defendant has committed a felony.

Commitment and Bail.

Commitment is the act of sending the defendant to some lawful place of imprisonment, to remain until he is released or removed by further order of the court. Bail is a substitute for commitment, by means of which the defendant is delivered or bailed into the hands of certain persons, who have signed a bond conditioned upon his appearance at the trial.

Prosecution.

This may be regarded as in the nature of a pleading on the part of the government, in which the prisoner is accused of the offense for which he has been arrested. If it is presented by a grand jury upon the suggestion of the public prosecutor, it is called an "indictment." If it is formulated by the grand jury upon their own motion, it is known as a "presentment." If it is presented by the public prosecutor without the aid of a grand jury, it is an "information."

Arraignment.

As a preliminary to the trial, the prisoner is arraigned,—that is, he is called to the bar of the court, where the indictment, information, or presentment is read to him, and he is asked to say whether he is guilty or not guilty.

Plea and Issue.

The prisoner may then respond, if he chooses to do so. If he pleads guilty, a trial becomes unnecessary. If he declines to plead, a plea of not guilty is entered.

Trial.

The right of a person accused of crime to a trial by jury is guarantied by the constitution of the United States. The trial closes with the verdict of the jury.

Sentence.

If the accused is found guilty upon the trial, sentence is pronounced upon him by the court. This is analogous to a judgment at common law, except that it specifies the amount and kind of punishment to which the prisoner shall be subjected.

Execution.

The execution in a criminal case is the application, by the proper officer, of the punishment directed by the court in its sentence.

CHAPTER XXVII.

TRIALS.

544–546. Early Forms of Trial.
547–548. Trial Procedure—Outline.
549–550. Evidence.

EARLY FORMS OF TRIAL.

544. A trial is the means employed by the courts to determine the issue or issues developed by the pleadings in a case.

545. Various crude forms of trial were in use in early England. Among them may be mentioned:

(a) Trial by compurgation.

(b) Trial by ordeal.

(c) Trial by battle.

546. These early forms of trial have been entirely superseded by the trial by jury, and the trial by the court itself, without jury.

The three forms of trial, by compurgation, by ordeal, and by battle, were of Saxon origin. The first two were applied chiefly to criminal cases. If a person accused of crime would swear that he was innocent, and could get a certain number of reputable men from his neighborhood to swear that they believed him, he was acquitted. If he could not clear himself by this method of compurgation, he was obliged to submit to the ordeal. This consisted in plunging the arm up to the elbow in boiling water, or in carrying a piece of red-hot iron a certain distance. It was believed that, if the accused was innocent, God would hold him harmless.

The trial by battle was more suited to cases of a civil nature. The two parties to the cause engaged in combat in presence of the judges, Heaven being appealed to to give the victory to him who was in the right. Trial by battle was not abolished in England until 1819.

About the time of the granting of Magna Charta, it became customary to select 12 men, who were acquainted with the facts in the case, to decide the issue. This was the earliest form of the jury. Gradually, however, that body came to assume its modern position. At present the jury is composed of persons who are unacquainted with the facts, but are informed in regard to them by the testimony introduced in their presence. They decide, not from what they know of the case, but from the evidence furnished by those who are acquainted with the facts.

Trial by jury is the common method of trial in actions at common law, criminal actions, and in those proceedings under the code which are in the nature of common-law actions. In equity, and in equitable proceedings under the code, the trials are usually by the court alone.

The function of the jury is to determine the facts of the case. The decision of points of law is by the judge. In a trial without jury, the judge decides both the law and the facts.

TRIAL PROCEDURE—OUTLINE.

547. The ordinary steps in a jury trial are as follows:

(a) **Impaneling the jury.**
(b) **Opening the case.**
(c) **Production of testimony.**
(d) **Argument.**
(e) **Charge to the jury.**
(f) **Verdict and judgment.**

548. In a trial without jury, the process is the same, except, of course, that no jury is impaneled, there is no charge to the jury, and no verdict separate from the judgment.

Impaneling the Jury.

It is essential to a successful trial that the jury be impartial. There is usually prepared for each term of court a list of qualified persons, from whom the jurors are to be selected. At the opening of the trial, 12 men from this list are called to the jury box, and, unless objection is made to them, or any one of them, they act as jurors in the particular case. But the law gives to each party the right to object to a certain person's sitting as a juror in his case, and, if proper reasons for the objection are given, the person so objected to will be supplanted by another from the jury list. Such an objection is called a "challenge for cause." In addition to the right to challenge for cause, it is usually provided that each party shall be allowed to challenge a specified number of jurors peremptorily, without assigning cause. In civil cases, each party is allowed by statute from two to five peremptory challenges, while in criminal cases a much larger number is allowed.

After the jury have been selected, they are sworn to well and truly try the matter in dispute, and a true verdict render upon the evidence presented in the case.

Opening the Case.

As an introduction to the testimony proposed to be offered, it is customary, though not essential, for each party to give an outline of what he proposes to prove. This makes it possible for the jury to appreciate what bearing the testimony has upon the case, when it is presented.

Production of the Testimony.

Where testimony exists in the form of documents, the papers themselves are introduced. Frequently, also, articles of various sorts are introduced into evidence. Such articles or papers, upon being presented, are marked "Exhibit A," "Exhibit B," etc., or by some other identifying mark, and are known by such mark throughout the trial. The jury, in such instances, inform themselves of the facts by actual inspection. They are also sometimes taken to inspect the premises where a particular act is alleged to have been committed.

But the most common sources of evidence are the witnesses in the case. They are summoned to appear by means of a writ of subpœna. After being sworn to testify to the truth, the whole truth, and nothing but the truth, they are questioned with regard to what they know of the matter in dispute. The party producing a witness, or his attorney, first examines him, bringing out the testimony desired. This is called the "direct examination." The opposite party may then cross-examine the witness, asking him questions pertaining to the matter brought out on the direct examination. There is then usually a redirect examination, and sometimes a recross-examination is allowed.

Argument.

After the testimony on both sides has been produced, each party may, in person or by his attorney, address the jury and the court in support of his claims. Usually the plaintiff makes the first address, and is followed by the defendant, after which the plaintiff has the right to close the discussion.

Judge's Charge—The Verdict—The Judgment.

The arguments having closed, the judge instructs the jury on the law of the case, the jury retire, and after deliberation return a verdict, and upon this verdict judgment is rendered by the court. The nature of the verdict and judgment has already been explained.

EVIDENCE.

549. Evidence is the means by which an allegation is shown to be true or false.

550. There are certain matters which it is unnecessary to prove, because they are of such a nature that the court will take notice of them whenever they are material to the controversy. Such matters are said to be "judicially noticed."

For example, it will not be necessary to furnish evidence of the ordinary course of nature, the political organization of our government, and the existence and title of other nations, the jurisdiction of superior courts in the State, the public laws of the State and of the United States, etc.

Four cardinal rules govern in the production of evidence in court. They are as follows:

(1) The evidence must correspond to the allegation, and be confined to the point in issue.

(2) It is sufficient if the substance only of the issue be proved.

(3) The burden of proof is on the party holding the affirmative.

(4) The best evidence of which the case is susceptible must be produced.

TABLE OF CASES CITED.

B

Page

Baltimore City Pass. Ry. Co. v. Kemp, 61 Md. 74..... 270
Bartlett v. Wood, 32 Vt. 372..... 109
Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10..... 54

C

Cohens v. Virginia, 6 Wheat. 264..... 127
Commonwealth v. Alger, 7 Cush. 53, 85..... 103
Cook v. Whiting, 16 Ill. 480..... 109

D

Dietz v. Farish, 53 How. Prac. 221..... 226

H

Hough v. Railroad Co., 100 U. S. 213..... 54

M

McCulloch v. Maryland, 4 Wheat. 316..... 32
McDonald v. State, 80 Wis. 407, 50 N. W. 185..... 68
Manzetti v. Williams, 1 Barn. & Adol. 415..... 234
Martin v. Hunter's Lessee, 1 Wheat. 304..... 127
Morse v. Tappen, 3 Gray, 411..... 233
Munn v. Illinois, 94 U. S. 113, 145..... 104

P

People v. Hatch, 33 Ill. 9..... 68

R

Page
Rae v. Hulbert, 17 Ill. 572 233
Railroad v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914 54
Railroad Co. v. Lockwood, 17 Wall. 357 54
Rann v. Hughes, 7 Term R. 350 233

S

State v. Brown, 33 N. C. 141 68
Stone v. Mississippi, 101 U. S. 818 103
Swift v. Tyson, 16 Pet. 1 54

W

Willard v. People, 5 Ill. 470 128

INDEX.

[THE FIGURES REFER TO PAGES.]

A

ABANDONMENT,
title by, 197.
ABATEMENT OF NUISANCES, 287.
ABSOLUTE ESTATES,
in real property, 187.
ACCESSION,
title by, 213.
ACCIDENT,
as a defense for crime, 136.
ACCORD AND SATISFACTION, 288.
ACCOUNTING, 298.
ACCRETION,
title by, 196.
ACT OF THE PARTIES,
title by, 212, 217.
ACTION,
forms of, 315.
ACTIONS,
classification of, 315.
ex contractu, 317.
ex delicto, 317.
mixed, 316.
of assumpsit, 317.
of covenant, 317.
of debt, 317.

[The figures refer to pages.]

ACTIONS—Continued,
of detinue, 317.
of replevin, 317.
of trespass, 317.
of trespass on the case, 317.
of trover, 317.
personal, 316.
real, 316.

ADJECTIVE LAW, 110.
scope of, 284.

ADMINISTRATIVE LAW, 112, 131.

ADMINISTRATOR, 223.
with the will annexed, 224.

ADMIRALTY,
court of, 306.

ADVERSE POSSESSION,
title by, 198.

ADVOWSON, 160.

AGENCY, 116, 252–258.
distinguished from service, 253.
how created, 256.
how terminated, 258.
parties to the relation of, 254.
unlawful contracts of, 255.

AGENT, 252.
how authorized, 256.

AGE OF CONSENT, 145.

AGREEMENT, 227.
elements of, 227.

AIR,
easements in light and, 168.

ALIEN, 18.

ALLODIAL OWNERSHIP,
of property, 99.

[The figures refer to pages.]

ALLUVIAN, 196.

AMENDMENT,
of constitutions, 129.

AMENDMENTS,
to the federal constitution, 130.

ANIMALS FERAE NATURAE, 213.

ANNUITY, 165.

ANSWER,
in equity, 322.

APPEAL,
court of, 308.
in chancery, 306.

APPEARANCE,
of parties, in a common-law action, 318.
in equity, 321

APPRENTICES, 156.

ARBITRATION AND AWARD, 288.

ARGUMENTS OF COUNSEL, 329.

ARISTOCRACY, 20, 22.

ARRAIGNMENT, 324.

ARREST, 324.

ARSON, 138.

ARTICLES OF ASSOCIATION, 266.

ARTICLES OF CONFEDERATION, 28.
defects of, 28n.

ASSAULT AND BATTERY, 275.

ASSIGNMENT,
deed of, 205.

ASSUMPSIT,
action of, 317.

AUTHORITIES,
rank of, 79.
conflicts in, 81.

AWARDS AND JUDGMENTS,
enforcement of in equity, 300.

[The figures refer to pages.]

B

BAIL,
in criminal cases, 324.

BAILEES,
liability of, 240.
exceptional, 241.

BAILMENTS,
nature of, 238.
how distinguished from sales, 238.
classification of, ancient, 239.
modern, 239.

BARGAIN AND SALE,
deed of, 205.

BENEFICE, 161.

BILL OF COMPLAINT,
in equity, 321.

BILLS AND NOTES, 243.
transfer of, 246.

BILLS OF EXCHANGE, 244.
form of, 245.
acceptance of, 245.

BILL OF RIGHTS, 92, 93, 129.

BOARD OF DIRECTORS,
of corporation, general powers of, 267.

BRANCHES OF GOVERNMENT, 24, 25.

BREACH OF CONTRACT,
remedies for, 231.

BURGLARY, 139.

C

CANON LAW,
nature of, 53.
in the United States, 55.

CAPITAL PUNISHMENT, 140.

CARDINAL RULES OF EVIDENCE, 330.

[The figures refer to pages.]

CASES,
construction and interpretation of, 79.

CESTUI QUE TRUST, 190.

CESTUI QUE USE, 189.

CESTUI QUE VIE, 182.

CHALLENGES OF JURORS, 328.
for cause, 328.
peremptory, 328.

CHANCERY,
rise of English court of, 56–58.

CHATTELS, 207.
real, 207.
personal, 207.

CHILDREN,
legitimate and illegitimate, 150.

CHOSES, 208.
in action, 208.
in possession, 208.

CIRCUIT COURTS,
of the United States, 311.

CIRCUIT COURTS OF APPEALS, 311.

CITIZENS, 18.

CITIZENSHIP,
in the United States, 41.

CIVIL LAW,
See "Roman Law."

CLAIMS,
court of, 311.

CLASSIFICATION,
of the municipal law, 110 et seq.
of crimes, 136.
of deeds, 203, 204.
of estates in real property, 171.

CODIFICATION, 45.

[The figures refer to pages.]

COLONIAL GOVERNMENT, 27.

COMMERCIAL ASSOCIATIONS, 259 et seq.

COMMERCIAL PAPER, 243.
transfer of, 246.

COMMODATUM, 239.

COMMON,
estates in, 186, 187.

COMMON CARRIERS, 242.
bailment liability of, 242.

COMMON LAW, 47.
development of, 48.

COMMON PLEAS,
court of, 306.

COMMUNICATION OF ASSENT, 228.

COMPENSATORY DAMAGES, 291.

COMPETENCY OF PARTIES,
to a contract, natural and legal, 228, 229.

COMPULSION,
as a defense for crime, 136.

CONDITIONAL ESTATES, 187.

CONDITIONAL LIMITATIONS, 189.

CONFEDERACY, 23.

CONFEDERATION,
articles of, 28.
defects in, 28n.

CONFIRMATION,
deed of, 205.

CONFLICTS OF AUTHORITY, 81.

CONGRESS OF THE UNITED STATES, 33.

CONGRESS,
continental, 27.

CONSTITUTION OF THE UNITED STATES,
a written constitution, 29.

[The figures refer to pages.]

CONSTITUTION OF THE UNITED STATES—Continued,
created a federal State, 26, 29.
went into effect when, 29.

CONSTITUTIONAL GUARANTIES,
of the fundamental rights, 92.

CONSTITUTIONAL LAW, 112, 123 et seq.

CONSTITUTIONAL LIMITATIONS ON THE STATES, 37.

CONSTITUTIONALITY OF STATUTES,
by whom determined, 126.
presumption of, 127.
when necessary to determine, 127.

CONSTITUTIONS,
amendment of, 129.
application of the doctrine of stare decisis to, 128.
construction of, 126.
English and German compared, 124.
nature of American, 125.
who may modify, 17.
written and unwritten, 123.
written, essentials of, 129.

CONSTRUCTION,
of laws in general, 76.
of statutes, 78.
of cases, 79.

CONTINENTAL CONGRESSES, 27.

CONSIDERATION, 230.

CONSPIRACY, 274.

CONTRACT,
title by, 218.

CONTRACTS, 116, 225 et seq.
classifications of, 231–234.
definitions of, 225, 226n.
executed and executory, 232.
express and implied, 233.
negotiable, 243.

[The figures refer to pages.]

CONTRACTS—Continued.
of insurance, 249.
kinds of, 249.
insurable interest necessary to, 250.
of record. 232.
of sale, 234.
executory and executed, 237.
when title passes under, 237.
of suretyship, 247.
application of the statute of frauds to, 247.
parol, 232.
quasi, 234.
specialties, 232.

CONTROL OF TRUSTS,
in equity, 296.

CONVERSION, 277.

CORODIES, 165.

CORPORATIONS, 116, 265 et seq.
how created. 266.
limitations on existence of, 268.
public and private, 265.

CORPOREAL AND INCORPOREAL PROPERTY, 105.

CORPOREAL HEREDITAMENTS, 158.

CORRECTION OF CONTRACTS,
in equity, 296.

COURT, 302.
high, of justice, 308.
of admiralty, 306.
of appeal in chancery, 307.
of appeal, English, 308.
of chancery, 306.
rise of, 56–58.
of claims, 311.
of common pleas, 306.
for divorce and matrimonial causes, 306.
full, in matrimonial causes, 307.

[The figures refer to pages.]

COURTS—Continued,
of exchequer, 306.
of exchequer chamber, 307.
of king's bench, 305.
of queen's bench, 305.
of private land claims, 312.
of probate, 306.
supreme, of the United States, 35, 310.

COURTS,
circuit, 311.
circuit, of appeals, 311.
district, 311.
federal, 309.
jurisdiction of, 303.
of England before 1873, 305 et seq.
of England since 1873, 308.
of record, 303.
of the District of Columbia, 312.
of the United States, 309 et seq.
State, 312.
territorial, 312.

COVENANT TO STAND SEISED TO USES, 205.

COVERTURE,
as a defense for crime, 135.

CREATION,
title by, 213.

CRIME, 132.
classes of, 136.
distinguished from tort, 133.
elements of, 134.
punishment for, 140.

CRIMINAL INCAPACITY, 134–136.

CRIMINAL LAW, 113, 132 et seq.

CRIMINAL PROCEDURE, 117.
outline of, 323.

[The figures refer to pages.]

CURTESY,
estates by the, 181.
essentials of, 181.

CUSTOM,
as a source of law, 48.
essentials of, 48.

D

DAMAGE FEASANT,
distress for animals, 288.

DAMAGES, 291.
classification of, 291.
compensatory, 291.
exemplary, 291, 292.
for breach of contract, 231.
nominal, 271, 291.

DEBT,
action of, 317.

DECEDENTS,
estates of, 219 et seq.

DECLARATION, 319.
of Independence, 27 and note.

DECLARATORY STATUTES, 71.

DECEIT, 278.

DECREE,
in equity, 322.
how enforced, 322.

DEEDS, 203.
classification of, 203, 204.
derivative, 204.
assignment, 205.
confirmation, 205.
defeasance, 205.
release, 205.
surrender, 205.

[The figures refer to pages.]

DEEDS—Continued,
original, 204.
exchange, 204.
feoffment, 204.
gift, 204.
grant, 204.
lease, 204.
partition, 205.
under the statute of uses, 204.
bargain and sale of lands, 205.
covenant to stand seised to uses, 205.
deed to declare uses, 205.
deed of revocation of uses, 205.
lease and release, 205.

DEFAMATION, 275.

DEFEASANCE,
deed of, 205.

DEMOCRACY, 20, 22, 23.

DEMURRER, 319.
in equity, 321.

DEPOSITUM, 239.

DERIVATIVE DEEDS, 204.

DESCENT,
title by, 194, 222.

DEVISE,
title by, 201.

DIGNITIES, 164.

DIRECTORY STATUTES, 73.

DISCLAIMER,
in equity, 321.

DISCOVERY, 299.

DISTRESS, 287.

DISTRIBUTION OF DECEDENTS' ESTATES, 224.

[The figures refer to pages.]

DISTRICT COURTS,
of the United States, 311.

DIVINE LAW, 5.

DIVORCE, 149.
a mensa et thoro, 149.
a vinculo matrimonii, 149.
grounds for, 149.

DOMESTIC RELATIONS, 114, 142 et seq.

DOMINANT ESTATE, 167.

DOWER,
estate in, 182.
essentials of, 182.

DRAFT, 244.

DRAWEE,
of bill of exchange, 245.

DRAWER,
of bill of exchange, 245.

E

EASEMENTS, 166.
distinguished from profits a prendre, 167.
in light and air, 168.
in party walls, 169.
in running water, 168.
of lateral support, 169.
violation of, 278.

EJECTMENT,
action of, 317.

EMINENT DOMAIN,
right of, 102.
title by, 200.

ENFORCEABILITY OF CONTRACT,
requisites of, 229.

ENFORCEMENT OF CONTRACT,
methods of, 231.

[The figures refer to pages.]

ENFORCEMENT OF AWARDS AND JUDGMENTS, 300.

ENTRY, 287.
writ of, 316.

EQUITABLE ESTATES, 189–192.

EQUITABLE REMEDIES, 294.

EQUITY, 50.
answer in, 322.
auxiliary jurisdiction of court of, 60.
bill of complaint in, 321.
concurrent jurisdiction of court of, 60.
decree in, 322.
how enforced, 322.
demurrer in, 322.
disclaimer in, 322.
function of in legal development, 50, 51.
history of in England, 56–58.
in Code States, 59.
jurisdiction, general nature of, 56.
specific character of, 60, 61n.
where vested in England, 56.
where vested in the United States, 56, 59.
maxims of, 61–63.
plea in, 322.
procedure in, 320–322.
remedies in, 294.
subpœna in, 321.
trials in, 321.

ESCHEAT, 223.
title by, 196.

ESTATE, 170.

ESTATES IN REAL PROPERTY, 170–192.
absolute, 187.
at sufferance, 183.
at will, 183.

[The figures refer to pages.]

ESTATES IN REAL PROPERTY—Continued,
by the curtesy, 181.
essentials of, 181.
classification of, 171.
conditional, 187.
equitable, 189–192.
for life, 180.
legal and conventional, 180.
for years, 183.
freehold, 177.
from year to year, 183.
in common, 186, 187.
in dower, 182.
essentials of, 182.
in entirety, 186.
in expectancy, 172.
in fee simple, 178.
in fee tail, 178.
in joint tenancy, 185.
the four unities in, 185, 186.
right to survivorship in, 185, 186.
in mortgage, 189.
in possession, 172.
in remainder, 172.
rules governing, 173.
vested and contingent, 174.
in reversion, 175.
in severalty, 185.
less than freehold, 177.
classification of, 183.
number and relation of tenants of, 185.
of inheritance and not of inheritance, 178.
of decedents, succession to, 219 et seq.
pur autre vie, 182.
real and personal, 177.
time when enjoyment of begins, 172.
title to, how transferred, 193 et seq.
transfer of, 193 et seq.

[The figures refer to pages.]

ESTATES IN REAL PROPERTY—Continued,
upon condition, 188.
express and implied, 188.
precedent and subsequent, 188.
effect of breach of condition in, 189.
upon conditional limitation, 189.

ESSENTIALS OF PROCEDURE, 314.

ESTOPPEL,
doctrine of, 256.

EVIDENCE, 330.
cardinal rules of, 330.

EXAMINATION OF WITNESSES, 329.

EXCHANGE,
deed of, 204.

EXECUTION,
in civil cases, 320.
in criminal cases, 325.
title by, 199, 216.

EXECUTIVE POWERS OF FEDERAL GOVERNMENT,
by whom exercised, 33.

EXECUTOR, 33.

EXECUTORY DEVISE, 176.

EXCHEQUER,
court of, 306.

EXCHEQUER CHAMBER,
court of, 307.

EXECUTORY INTERESTS, 176.

EX POST FACTO LAW, 31n, 74.

EXTRALEGAL REMEDIES, 285.

[The figures refer to pages.]

F

FACTS JUDICIALLY NOTICED, 330.

FALSE IMPRISONMENT, 276.

FEDERAL COURTS, 309.

FEDERAL GOVERNMENT,
relation of to the States, 31.

FEDERAL STATE, 23.

FEES, 178.

FEE SIMPLE,
estates in, 178.

FEE TAIL,
estates in, 178.
after possibility of issue extinct, 180.

FELONIES,
at common law, 137.

FELONY, 136.

FEOFFMENT,
deed of, 204.

FEUDAL SYSTEM, 97.
tenures under, 98.

FICTIONS, LEGAL, 50.

FINDER OF GOODS,
rights of, 214.

FINES,
as a punishment for crime, 141.

FIXTURES, 108, 109.

FORECLOSURE OF MORTGAGES, 297.

FORFEITURE,
title by, 197, 215.

FORM,
when necessary to avoid contract, 230.

[The figures refer to pages.]

FORMEDON,
writ of, 316.

FORMS OF GOVERNMENT, 20–23.

FRANCHISE, 164.

FREEHOLD ESTATES, 177.

FUNCTIONS OF GOVERNMENT, 19 and note.

FUNDAMENTAL RIGHTS IN REM, 89.
constitutional guaranties of, 92.

G

GIFT, 217.
causa mortis, 217.
deed of, 204.
inter vivos, 217.
title by, 217.

GOODS CAPTURED IN WAR,
title to, 214.

GOODS LOST OR DESTROYED,
title to, 214.

GOVERNMENT, 18.
branches of, 24, 25.
colonial, 27.
federal, relation of to the States, 31.
forms of, 20–23.
functions of, 19 and note.
in the United States, 26 et seq.
local, 38.
representative, 15.
revolutionary, 28.
State, 35 et seq.

GRANT,
deed of, 204.
private, 201, 202.
public, 203.
title by, 201.

[The figures refer to pages.]

GUARANTOR, 247.

GUARANTY, 247.

GUARDIAN AND WARD, 154 et seq.
termination of the relation of, 155.

GUARDIANS,
rights and duties of, 155.

GUARDIANSHIP,
kinds of, 154.
termination of, 155.

GUEST, 241.

H

HABEAS CORPUS ACTS, 92, 93.

HABEAS CORPUS,
writ of, 294.

HEIR, 222.

HEIRLOOMS, 159.

HEREDITAMENTS,
corporeal, 158.
incorporeal, at common law, 160.
in the United States, 166.

HIGH COURT OF JUSTICE,
English, 308.
divisions of 308.

HOUSE OF LORDS,
as a court of appeal, 307.

HOUSE OF REPRESENTATIVES, 34.

HUMAN ACTION,
laws of, 2.

HUSBAND AND WIFE, 148.
property rights of, 148.
personal rights and duties of, 147.
termination of the relation of, 149.

[The figures refer to pages.]

I

ILLEGALITY OF CONTRACT,
effect of, 230.

IMPOSSIBILITY OF PERFORMANCE OF CONTRACT,
effect of, 230.

IMPOTENCY,
as an impediment to marriage, 145.

IMPRISONMENT,
as a punishment for crime, 141.

INCORPOREAL HEREDITAMENTS,
at common law, 160.
in the United States, 166.

INCORPOREAL PERSONAL PROPERTY, 210.

INDEPENDANT CONTRACTOR, 253.

INDICTMENT, 324.

INFANTS, 150.
disabilities of, 151.

INFANCY,
as a defense for crime, 134.

INHERITANCE, 222.

INJUNCTION,
writ of, 117, 295.

INNKEEPER, 241.
bailment liability of, 242.

INSANITY,
as a defense for crime, 135.

INSURABLE INTEREST, 250.

INSURANCE,
contract of, 249.
kinds of, 249.
policy, 249.

INTERESTS IN PERSONAL PROPERTY,
kinds of, 211.

[The figures refer to pages.]

INTERFERENCE WITH CONTRACT,
malicious, 279.

INTERNATIONAL LAW, 7.
sources of, 8, 9.

INTERPLEADER, 300.

INTERPRETATION,
of laws in general, 76.
of cases, 79.
of statutes, 78.

INTERSTATE COMMERCE LAW, 38.

INTESTATE, 219.

INTESTATE SUCCESSION, 219–222.

ISSUE, 319.

J

JOINT-STOCK COMPANIES, 264.

JOINT TENANCY,
estates in, 185.
the four unities in, 185, 186.
right of survivorship in, 185, 186.

JUDGMENTS, 320.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,
as a court of appeal, 307.

JUDICIAL DECREE,
title by, 199.

JUDICIAL NOTICE, 330.

JUDICIAL POWERS OF THE FEDERAL GOVERNMENT,
by whom exercised, 33.

JURISDICTION, 303.
exclusive and concurrent, 304.
general and limited, 304.
national, limits of, 10, 11.
original and appellate, 303.

[The figures refer to pages.]

JURY,
address to, 329.
functions of, 327.
impaneling of, 328.
judge's charge to, 329.

L

LAND, 158.

LANDS, TENEMENTS, AND HEREDITAMENTS, 107.

LARCENY, 139.

LAST WILL AND TESTAMENT, 221.

LATERAL SUPPORT, 169.

LAW,
administrative, 131.
classification of, 110 et seq.
constitutional, 112.
construction of, 76.
criminal, 113.
divine, 5.
in general, 1.
international, public, 7, 8.
private, 7, 10.
maritime, 10.
martial, 13.
military, 13n.
moral, 4.
municipal, 5.
of agency, 116, 252.
of bailments, 116, 238.
of commercial paper, 116, 243.
of contracts, 116, 225.
of corporations, 116, 265.
of domestic relations, 114, 142.
of human action, 2.
of nations, distinguished from international law, 8n.
of partnership, 116, 259.
of persons and personal rights, 115.

[The figures refer to pages.]

LAW—Continued,
of physical science, 1.
of procedure, 118, 313.
of real property, 115, 158, 170, 193.
of sales, 116, 235.
of succession after death, 115, 219.
of torts, 113, 269.
positive, 5.
private adjective, 118.
private international, 7, 10.
private substantive, 113.
public adjective, 117.
public and private, 111.
public international, 78.
public substantive, 112.
relating to business affairs, 113, 116.
relating to personal rights, 113, 114.
relating to property rights, 113, 115.
relation of, to the State, 14.
Roman, 45, 46.
substantive and adjective, 110.
unwritten, 43 et seq.

LAW MERCHANT, 52.

LEASE,
deed of, 204.

LEASE AND RELEASE,
deed of, 205.

LEGISLATIVE POWERS OF THE FEDERAL GOVERNMENT,
by whom exercised, 33.

LIABILITY, CONTRACTUAL,
rests only on parties to contract, 231.

LIBEL, 275.

LIFE ESTATES, 180.
conventional, 180.
legal, 180.

LIGHT AND AIR.
easements in, 168.

[The figures refer to pages.]

LIMBS, 90.

LIMITED PARTNERSHIPS, 262.
authorized and regulated by statute, 263.

LOCAL SELF GOVERNMENT, 38.
in New England, 40.
in the Northwest, 40.
in the South, 40.

LOCATIO, 239.

M

MAGNA CHARTA, 92.

MALICIOUS INTERFERENCE WITH CONTRACT, 279.

MALICIOUS PROSECUTION, 276.

MANDAMUS,
writ of, 117, 292.

MANDATUM, 239.

MANSLAUGHTER, 138.

MARITIME LAW, 10.

MARRIAGE, 142.
contract of, 146.
how dissolved, 149.
impediments to, 144.
property rights acquired by, 148.
solemnization of, 147.
title by, 198, 215.

MARRIED WOMEN'S ACTS, 148.
general result of, 149.

MARTIAL LAW, 13.

MASTER AND SERVANT, 156 et seq.

MAXIMS, 61.
of equity, 61–63.

MENTAL INCAPACITY,
as an impediment to marriage, 145.

MILITARY LAW, 13n.

MISDEMEANORS, 137.

[The figures refer to pages.]

MONARCHY, 20.
absolute and limited, 20, 22.
hereditary and elective, 20, 22.

MORAL LAW, 4.

MORTGAGE,
estates in, 189.
foreclosure of, 297.

MORTMAIN,
statutes of, 190.

MUNICIPAL CORPORATIONS, 39.

MUNICIPAL LAW, 5.
distinguished from arbitrary commands, 6.
distinguished from contract, 7.

MUTUAL ASSENT, 228.

MURDER, 137.

N

NATIONAL JURISDICTION,
limits of, 10, 11.

NATIONS,
law of, 8n.

NATURALIZATION, 42.
to whom available, 42.
rules governing, 42.

NECESSITY,
as a defense for crime, 136.

NE EXEAT,
writ of, 299.

NEGLIGENCE, 273.

NEGOTIABLE INSTRUMENTS, 243.

NEGOTIABLE PAPER, 243.

NEGOTIABILITY, 244.
words of, 246.

NOMINAL DAMAGES, 291.

NUISANCE, 274.

[The figures refer to pages.]

O

OBITER DICTA, 80 and note.
OCCUPANCY.
title by, 213.
OFFICES,
in England, 163.
in the United States, 164.
OPENING OF TRIAL, 328.
OPERATION OF LAW,
title by, 212, 215.
ORIGINAL ACQUISITION,
title by, 212, 213.
OVERRULES CASES, 81.
OWNERSHIP OF PROPERTY, 101, 210.
limitations on, 101–104.

P

PARENT AND CHILD, 150 et seq.
PARENTS,
duties of to children, 152.
rights of against children, 153.
PARTITION, 298.
deed of, 205.
PARTNERS, 259.
by estoppel, 261.
mutual agency of, 262.
rights and liabilities of, 260.
PARTNERSHIPS, 259.
how formed, 261.
limited, 262.
PARTNERSHIP ASSOCIATIONS LIMITED, 263.
PARTY WALLS,
easements in, 169.

[The figures refer to pages.]

PATENTS FOR USEFUL INVENTIONS, 214.

PATENT,
as a conveyance, 202.

PATRIARCHY, 20.

PAWN, 239.

PERPETUATION OF TESTIMONY, 300.

PERSONAL ACTIONS, 316.

PERSONAL LIBERTY,
right of, 91.

PERSONAL REPRESENTATIVE, 223n.

PERSONAL SECURITY,
right of, 89.

PERSONS, 86.
natural and artificial, 86.

PETITION OF RIGHT, 92, 93.

PHYSICAL SCIENCE,
laws of, 1.

PIGNUS, 239.

PLEAS,
by way of confession and avoidance, 319.
by way of traverse, 319.
in actions at law, 319.
in criminal cases, 325.
in equity, 322.

PLEADINGS,
in general, 314.
at common law, 319.
in equity, 321.
under the codes, 322.

POSITIVE LAW, 5.

POSSESSION, 101.
estates in, 172.
right of, when incident to ownership, 101.

PRAECIPE, 318.

[The figures refer to pages.]

PREROGATIVE,
title by, 216.

PRESCRIPTION,
title by, 197.

PRESENTMENT, 324.

PRINCIPAL AND AGENT, 252 et seq.
distinguished from master and servant, 253.
how relation of created, 256.
how relation of terminated, 258.
parties to the relation of, 254.

PRINCIPAL AND SURETY, 247.

PRIOR MARRIAGE UNDISSOLVED,
as an impediment to marriage, 145.

PRIVATE ADJECTIVE LAW, 118.

PRIVATE GRANT,
title by, 203.

PRIVATE INTERNATIONAL LAW, 7, 10.

PRIVATE PROPERTY,
right of, 92, 95 et seq.

PRIVATE SUBSTANTIVE LAW, 113.

PROBATE,
court of, 306.

PROCEDURE,
law of, 118, 313.
code, 322.
common law, 315.
criminal, 323.
equitable, 320.
essentials of, 314.

PROFITS A PRENDRE, 166.
distinguished from easements, 167.

PROHIBITION,
writ of, 117, 293.

[The figures refer to pages.]

PROPERTY, 95.
corporeal and incorporeal, 105.
historical phases of, 96.
limitations on the ownership of, 102–104.
real and personal, 106–108.

PROSECUTION, 324.

PROXIMATE AND REMOTE CAUSE, 272.

PUBLIC AND PRIVATE LAW, 111.

PUBLIC ADJECTIVE LAW, 117.

PUBLIC GRANT,
title by, 201, 202.

PUBLIC INTERNATIONAL LAW, 7, 8.

PUBLIC SUBSTANTIVE LAW, 112.

PUNISHMENT FOR CRIME, 140.
capital, 140.

PURCHASE,
title by, 194.

Q

QUASI CONTRACTS, 234.

QUIETING TITLE, 297.

QUO WARRANTO,
information in the nature of, 117, 293.

R

RAPE, 138.

RATIFICATION,
of unauthorized act of agent, 257.

RECAPTION, 286.

RECEIVER, 298.

RESCISSION,
of contract in equity, 296.

RECOGNIZANCE, 233n.

[The figures refer to pages.]

RE-EXECUTION,
of contracts in equity, 296.
RELATION OF THE STATE TO THE MUNICIPAL LAW, 14, 15.
RELATIONSHIP,
when an impediment to marriage, 144.
RELEASE,
deed of, 205.
REMAINDER,
estates in, 172.
rules governing, 173.
vested and contingent, 174.
REMEDIES, 284.
civil, 289.
common law, 289.
extralegal, 285.
equitable, 294.
legal, 82, 285.
penal, 289.
REMITTER, 286n.
RENT, 165.
charge, 166.
seek, 166.
service, 166.
REPRESENTATIVE GOVERNMENT, 28.
REPRISAL, 286.
RESTORATION, 290.
RETAINER, 286n.
REVERSION,
estates in, 175.
REVOLUTIONARY GOVERNMENT, 28.
RIGHTS,
legal, 82.
in personam, 84–86.
in rem, 84–86.
ROBBERY, 139.

[The figures refer to pages.]

ROMAN LAW, 45–47.
at base of continental legal systems, 45.
historical sketch of, 46.

RUNNING WATER,
easements in, 168.

S

SANCTION, 2.
in the Divine law, 5.
in the moral law, 4.
in the municipal law, 284.

SELF-DEFENSE, 286.

SENATE OF THE UNITED STATES, 34.
as a court, 312.

SENTENCE, 325.

SERVANTS, 156.

SEVERALTY,
estates in, 185.

SHELLEY'S CASE,
rule in, 175n.

SLANDER, 275.

SOVEREIGNTY, 15.
under the articles of confederation, 28.
where vested in general, 16.
where vested in the United States, 32.

SPECIFIC PERFORMANCE OF CONTRACTS, 295.

STARE DECISIS,
doctrine of, 48.

STATE, 14.
elements of, 18.
federal, 23.
purpose of, 15.

STATE COURTS, 312.

STATE GOVERNMENTS, 15.

STATE LEGISLATURES, 37.

[The figures refer to pages.]

STATES,
confederation of, 23.
sovereign and dependent, 15, 16.

STATUS, 86.
relations of, 88.

STATUTES, 64.
affirmative and negative, 70.
constitutionality of, 69.
construction of. 78.
general and local, 72.
how enacted, 67–69.
mandatory and directory, 73.
prospective and retrospective, 74.

STATUTE OF FRAUDS,
seventeenth section, 236.
fourth section, 247.

STATUTE OF USES, 191.

STOCKHOLDERS IN A CORPORATION,
rights of, 267.
liabilities of, 268.

SUBJECTS, 18.

SUBJECT-MATTER OF CONTRACT, 229.
must be valuable, 230.

SUBSTANTIVE AND ADJECTIVE LAW, 110.

SUBSTANTIVE LAW,
private, 113.

SUBPOENA, 321.

SUCCESSION AFTER DEATH, 219 et seq.
history of, 219.
intestate, 219, 222.
testate, 219, 221.

SUCCESSION,
title by, 215.

SUPREME COURT OF THE UNITED STATES, 35, 310.

[The figures refer to pages.]

SURETY, 247.
discharge of, 248.
right of to indemnity, 249.

SURETYSHIP, 247.

SURRENDER,
deed of, 205.

SYLLABUS, 80.

T

TENANT, 170.

TENURE, 98.
by knight service, 98.
in chivalry, 98.
in socage, 100.

TERRITORIAL COURTS, 312.

TESTAMENT, 221.

TESTATOR, 219.

TESTIMONY,
production of, 329.

TITHES, 160.
predial, mixed, and personal, 161.

TITLE,
when passes under a contract of sale, 237.

TITLE TO PERSONAL PROPERTY,
by accession, 213.
by act of the parties, 212, 217.
by contract, 218.
by creation, 213.
by execution, 216.
by forfeiture, 215.
by gift, 217.
by judicial decree, 216.
by legal process, 212, 216.
by marriage, 215.
by occupancy, 213.
by operation of law, 212, 215.

[The figures refer to pages.]

TITLE TO PERSONAL PROPERTY—Continued,
by original acquisition, 212, 213.
by prerogative, 216.
by succession, 215.
by testament, 218.

TITLE TO REAL PROPERTY, 193–206.
by abandonment, 197.
by accretion, 196.
by adverse possession, 198.
by alienation, 198.
definition of, 193.
by deed, 203 et seq.
see "Deeds."
by descent, 194.
by devise, 201.
by eminent domain, 200.
by escheat, 196.
by execution, 199.
by forfeiture, 197.
by grant, 201.
by judicial decree, 199.
by marriage, 198.
by prescription, 197.
by purchase, 194.
tax titles, 200.

TORTS, 269 et seq.
classification of, 272, 273.
elements of, 271.
distinguished from breaches of contract, 270.
distinguished from crimes, 269.

TRESPASS, 277.
de bonis asportatis, 277.
quare clausum fregit, 277.
vi et armis, 277.

TREASON AGAINST THE UNITED STATES, 136.

TREATIES,
nature of, 9.

[The figures refer to pages.]

TRIAL, 326.
by battle, 327.
by compurgation, 326.
by jury, 327.
by ordeal, 326.

TRUSTEE, 190.

TRUSTS, 190 et seq.
equitable control of, 296.

U

UNCONSTITUTIONALITY OF STATUTES,
effect of, 128.

UNWRITTEN LAW, 43 et seq.
of the federal government, 53.
of the States, 54.
relation of to the written law, 44, 66.

USE,
cestui que, 189.
feoffee to, 189.

USES, 189.
statute of 191.

V

VERDICT, 320.

VIOLATION OF EASEMENTS, 278.

VIE,
cestui que, 182.

VOLUNTARY ASSOCIATIONS, 264.
who liable for the debts of, 264.

W

WILL, 221.
last and testament, 221.

WITNESSES, 329.
examination of, 329.
how summoned, 329.

[The figures refer to pages.]

WRIT,
of dower, 317.
of entry, 316.
of formedon, 316.
of quare impedit, 317.
of right, 316.
of right of dower, 317.

WRITTEN LAW, 64 et seq.
of England, 64.
of the federal government, 64, 65.
of the States, 64, 66.
relation of to the unwritten law, 44, 66.

WRONGS,
legal, 82.

Y

YEARS,
estates for, 183.

YEAR TO YEAR,
estates from, 183.

WEST PUBLISHING CO., PRINTERS AND STEREOTYPERS, ST. PAUL, MINN.